No. 04-5286

In the Supreme Court of the United States

MICHAEL DONALD DODD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
ELIZABETH A. OLSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the one-year limitations period in 28 U.S.C. 2255 para. 6(3) begins to run on the date on which the right asserted is initially recognized by this Court or whether, instead, the limitations period begins to run on the date on which this Court or another court first holds that the relevant right applies retroactively to cases on collateral review.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 16-33) is reported at 365 F.3d 1273. The district court's order of dismissal (J.A. 15) is unreported, as is the report and recommendation of the magistrate judge (J.A. 11-14) on which the district court relied.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2004. The petition for a writ of certiorari was filed on July 14, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Section 2255 of Title 28 of the United States Code are set forth in an appendix to this brief.

STATEMENT

Petitioner was indicted on June 25, 1993, in the United States District Court for the Southern District of Florida, for knowingly and intentionally engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 841 and 846 (Count 1); conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) (Count 2); conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 3); and sixteen counts of using and possessing a passport obtained by false statement, in violation of 18 U.S.C. 1546(a) (Counts 4-19). After trial by jury, petitioner was found guilty on all counts except Count 3. Petitioner was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed the conviction on May 7, 1997. See *United States* v. *Dodd*, 111 F.3d 867 (11th Cir.) (per curiam); J.A. 17.

On April 4, 2001, petitioner filed a motion under 28 U.S.C. 2255, seeking to set aside his CCE conviction based on *Richardson* v. *United States*, 526 U.S. 813 (1999), which this Court decided on June 1, 1999. J.A. 18. The district court dismissed the motion as time-barred, J.A. 15, and the court of appeals affirmed the dismissal, holding that petitioner's one year to file a motion under Section 2255 para. 6(3) began to run on the date *Richardson* was decided and had elapsed before the instant motion was filed. J.A. 33.

1. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, no statute of limitations governed motions for collateral relief under 28 U.S.C. 2255. Under the pre-AEDPA law, a federal prisoner could file such a motion "at any time," 28 U.S.C. 2255 para. 2 (1994), and the government was entitled to have

the motion dismissed as untimely only if it was "prejudiced in its ability to respond to the motion by delay in its filing," Rule 9(a) of the Rules Governing § 2255 Proceedings (28 U.S.C. at 490). As a result, a prisoner could wait an indefinite period after his conviction before seeking collateral relief.

To "curb the lengthy delays in filing" that "often occur in federal habeas corpus litigation," H.R. Rep. No. 23, 104th Cong., 1st Sess. 9 (1995), Congress added a statute of limitations when it enacted the AEDPA. Section 105 of AEDPA, 110 Stat. 1220, which is codified in paragraph 6 of 28 U.S.C. 2255, establishes a "1-year period of limitation" for motions brought under Section 2255. The period runs from "the latest" of a number of events, which are set forth in subparagraphs (1) through (4) of paragraph 6.

The general rule, found in subparagraph (1), and interpreted by this Court in *Clay* v. *United States*, 537 U.S. 522 (2003), is that the triggering date is "the date on which the judgment of conviction becomes final." Three exceptions to that rule permit the one-year limitation period to begin later. Under subparagraph (2), the one-year period begins to run on "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." Under subparagraph (4), the provision at issue in *Johnson* v. *United States*, cert. granted, No. 03-9685 (Sept. 28, 2004), the one-year period begins to run on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." This case involves subparagraph (3), under which the one-year period begins to run on "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."

2. a. Petitioner was a leader of a large Jamaican drug distribution network in New York City called the "Spangler Posse." Gov't C.A. Br. 4.[1] In September 1988, Audley Antonio and Ainsley Brown were arrested in Mississippi transporting more than $500,000 in U.S. currency hidden in their vehicles. The cash was being delivered to Manley Cargill in Florida, who was a source of cocaine for the Spangler Posse. *Id.* at 3-4. At trial, the government called five witnesses who were actively involved in the Spangler Posse in the 1970s and 1980s. Their testimony demonstrated that the Posse purchased cocaine and marijuana in Florida and other places and sold the drugs in Manhattan at least until the late 1980s, and that petitioner was one of the organization's leaders. *Id.* at 5-16.

b. After a jury found him guilty of numerous drug violations, including engaging in a CCE, petitioner appealed his conviction, challenging certain statements made by the prosecutor and by a government witness and arguing that he should have received an adjustment at sentencing for acceptance of responsibility. The court of appeals affirmed the conviction and sentence on May 7, 1997. See *United States* v. *Dodd*, 111 F.3d 867 (11th Cir.) (per curiam). Petitioner did not file a petition for a writ of certiorari, and his conviction therefore became final on August 6, 1997, when the time for filing such a petition expired. J.A. 18.

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[1] "Gov't C.A. Br." refers to the government's brief in the initial appeal of petitioner's conviction, in *United States* v. *Dodd*, No. 95-4978.

3. On June 1, 1999, this Court decided *Richardson* v. *United States*, 526 U.S. 813, which held that, to find a defendant guilty on a CCE count, a jury must agree unanimously on the constituent drug violations that make up the continuous series of violations.

4. On April 4, 2001, more than three years after his conviction became final and nearly two years after this Court's decision in *Richardson*, petitioner filed a motion under Section 2255, arguing that his Sixth Amendment and due process rights were violated because the jury in his underlying criminal case was not instructed that the CCE charge required that it unanimously agree on the constituent drug violations that formed the series. The government argued that petitioner's claim was time-barred, because it was filed beyond the one-year limitations period set forth in 28 U.S.C. 2255 para. 6.

Petitioner responded that the motion was timely because it was filed within a year of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and also noted that the motion was based in part on *Richardson*. J.A. 12-13. In addition, he argued that the limitations period should be equitably tolled because he had been transferred to another facility during that time period. J.A. 13.

The district court, adopting the reasoning of the magistrate judge's report and recommendation, rejected those arguments. The court concluded, first, that the Eleventh Circuit had held, in *McCoy* v. *United States*, 266 F.3d 1245, 1259 (2001), cert. denied, 536 U.S. 906 (2002), that *Apprendi* does not apply retroactively to cases on collateral review; second, that *Richardson* had been decided more than one year before petitioner filed his Section 2255 motion, and the motion was therefore outside the limitations period; and third, that

petitioner had not demonstrated the extraordinary circumstances that would justify equitable tolling. J.A. 13. The court dismissed the motion as time-barred. J.A. 15.

5. The court of appeals affirmed the dismissal. J.A. 33.

On appeal, petitioner contended, *inter alia*, that the one-year limitations period defined in 28 U.S.C. 2255 para. 6(3) did not begin to run until April 19, 2002, the date on which the court of appeals decided *Ross* v. *United States*, 289 F.3d 677 (11th Cir.), cert. denied, 537 U.S. 1113 (2003), which held that the rule announced in *Richardson* applied retroactively to cases on collateral review. J.A. 19. The government disagreed, arguing that the limitation period began to run on the date this Court decided *Richardson*. The court of appeals, while acknowledging a circuit split on the question,[2] agreed with the government's position. J.A. 20-21.

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[2] Compare *United States* v. *Lopez*, 248 F.3d 427, 432-433 (5th Cir.), cert. denied, 534 U.S. 898 (2001) (period runs from date of Supreme Court decision initially recognizing the right asserted); *Nelson* v. *United States*, 184 F.3d 953, 954-955 (8th Cir.) (same), cert. denied, 528 U.S. 1029 (1999); *Triestman* v. *United States*, 124 F.3d 361, 371 n.13 (2d Cir. 1997) (same); with *Pryor* v. *United States*, 278 F.3d 612, 616 (6th Cir. 2002) (limitations period does not begin to run until the right has been held retroactive to cases on collateral review); *Ashley* v. *United States*, 266 F.3d 671, 672 (7th Cir. 2001) (same); *United States* v. *Valdez*, 195 F.3d 544, 547-548 (9th Cir. 1999) (same); *United States* v. *Lloyd*, 188 F.3d 184, 188 (3d Cir. 1999) (same); *In re Vial*, 115 F.3d 1192, 1197 n.9 (4th Cir. 1997) (same).

Two other circuits have noted the conflict, but have not taken a position on the correct understanding of Section 2255 para. 6(3). See *Sepulveda* v. *United States*, 330 F.3d 55, 64 n.5 (1st Cir. 2003); *Haugh* v. *Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000).

As a preliminary matter, the court of appeals noted that it had already held that *Richardson* established a newly created right within the meaning of paragraph 6(3) and that the right is retroactively available on collateral review. J.A. 22-23 (citing *Ross*, *supra*). The court also noted that "[n]either party contends that [paragraph 6(3)] requires that the retroactivity decision be made by the Supreme Court; rather, any court may do so." J.A. 23.

Turning to the question of when the limitations period begins to run, the court noted that "the statute provides that the limitations period begins to run on the date on which the right asserted was *initially* recognized by the Supreme Court." J.A. 25. The court of appeals then addressed "the purpose of the qualifying clause that follows: 'if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.'" J.A. 25 (quoting 28 U.S.C. 2255 para. 6(3)). The court found that the clause "simply reiterat[es] the obvious:" that paragraph 6(3) "provides a narrow exception which can be relied upon only when the new right recognized by the Supreme Court can be retroactively applied on collateral review." J.A. 25-26. Thus, the court found, the second clause in Section 2255 para. 6(3) "qualifies the right asserted—not the time limit." J.A. 26. The court of appeals concluded:

> if Congress intended the limitations period to begin running when a right was made retroactive, it could easily have said the limitation period shall run from the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review. Instead, Congress has written that "[t]he limitation period shall run from . . . the date on which the right asserted was

> *initially* recognized by the Supreme Court. . . ." 28 U.S.C. § 2255(3) (emphasis added). There is no reason to believe that Congress intended this unequivocal phrase to mean anything other than what it says.

J.A. 26.

SUMMARY OF ARGUMENT

A Section 2255 motion is timely under 28 U.S.C. 2255 para. 6(3) if it is filed within one year after "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." The plain text of that provision unambiguously sets one and only one date from which the one year period runs—"the date on which the right asserted was initially recognized by the Supreme Court." Accordingly, regardless of any other requirements of paragraph 6(3), a Section 2255 motion that is filed more than one year after that date is not timely under that provision. Petitioner's Section 2255 motion asserted a right based on *Richardson*, *supra*, which was decided on June 1, 1999. Because the motion was filed on April 4, 2001, far more than one year after *Richardson* was decided, petitioner's motion is not timely under paragraph 6(3).

The "if" clause in paragraph 6(3) sets a condition on the use of the date specified; it does not identify (or even refer in any way to) any other or later date by which a timely Section 2255 motion can be filed. In particular, the "if" clause states that a right must have been newly recognized by this Court and made retroactive. To the extent the conditions specified in the "if" clause are not satisfied, the statute of limitations in paragraph 6(3) is inapplicable, and the case is governed

by the general one-year-from-final-judgement rule laid out in paragraph 6(1). The language in the "if" clause does not identify the date on which the newly recognized right is made retroactive as the triggering date that commences the running of the one-year limitations period.

There are two interpretive issues that arise in construing the "if" clause: whether the retroactivity holding may be made by any court with jurisdiction over the Section 2255 motion or only this Court, and whether the retroactivity holding must be made before the Section 2255 motion is filed. The resolution of those issues, however, bears only on whether the conditions expressed in the "if" clause are satisfied. If those conditions are satisfied, a Section 2255 motion may be filed up to one year from the initial recognition of the right by this Court. Resolution of those interpretive issues, however, could not alter the date from which the one-year period is measured (the date of initial recognition by this Court), and it could not render timely petitioner's Section 2255 motion, which was filed more than one year after the *Richardson* right was initially recognized.

It is true that allowing Section 2255 motions for only one year from the date this Court initially recognizes a new right will likely limit the ability of prisoners to file timely second or successive Section 2255 motions. This Court rarely will hold a new rule retroactive within a year of initially recognizing it, and such a retroactivity decision by this Court was held in *Tyler* v. *Cain*, 533 U.S. 656 (2001), to be a prerequisite under Section 2255 para. 8(2) for a prisoner to file a second or successive petition based on the new rule. Nonetheless, the fact that second or successive petitions will often be untimely does not provide a basis for disregarding the

plain terms of paragraph 6(3). This Court has often recognized that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). It is for Congress to draw the balance between the need for a final end to litigation and the goals served by collateral review. Congress has done so in paragraph 6(3). If the balance results in restricting second or successive Section 2255 motions, where the costs to finality are particularly high, that is the result of Congress's design. It does not provide a basis for courts to rewrite the plain language of paragraph 6(3), as petitioner's theory would require, to make more second and successive motions timely.

The one-year limitations period in paragraph 6(3) is based on policies of repose and elimination of stale claims, which are of exceptional importance on collateral review of criminal convictions. The judgment Congress made in paragraph 6(3) is to permit Section 2255 motions based on a new rule recognized by this Court to be filed, but to mitigate the resulting costs by requiring such motions to be filed within a reasonable, one-year period after the right is recognized. Petitioner's rule, which would permit Section 2255 filings many years after a new rule is initially recognized, is inconsistent with Congress's judgment in paragraph 6(3) about how to draw the proper balance. It should be rejected.

ARGUMENT

THE LIMITATIONS PERIOD IN 28 U.S.C. 2255 PARA. 6(3) BEGINS TO RUN FROM THE DATE THIS COURT INITIALLY RECOGNIZES THE RIGHT ASSERTED, NOT FROM THE DATE IT HAS BEEN HELD TO BE RETROACTIVELY APPLICABLE TO CASES ON COLLATERAL REVIEW

A. The Text Of Section 2255 Para. 6(3) Unambiguously Begins The One-Year Period From The Date This Court Initially Recognizes The Right Asserted

Paragraph 6 of Section 2255 provides that "[a] 1-year period of limitation shall apply to a motion under [Section 2255]," and that "limitation period shall run from the latest of" four dates. The generally applicable date available to all Section 2255 applicants is set forth in paragraph 6(1)—one year from "the date on which the judgment of conviction becomes final." See *Clay* v. *United States*, 537 U.S. 522, 524 (2003). This case concerns the limitation period in paragraph 6(3), which may permit a later filing than would be permitted under the general rule set forth in paragraph 6(1).[3]

The text of paragraph 6(3) unambiguously identifies one and only one date from which its one-year period runs: "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." 28 U.S.C. 2255 para. 6(3). Petitioner's Section 2255 motion asserted a right based on *Richardson*. This

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[3] A virtually identical limitations period applies to habeas petitions by state prisoners under 28 U.S.C. 2244(d). This Court's resolution of the question presented in this case is therefore likely to govern that provision as well.

Court decided *Richardson* on June 1, 1999. That is the one and only "date on which the right asserted [by petitioner] was initially recognized by the Supreme Court." If paragraph 6(3), as opposed to the general rule of paragraph 6(1), is applicable to petitioner's Section 2255 motion at all, therefore, its limitation period terminated on June 1, 2000. Petitioner filed his Section 2255 motion on April 4, 2001, almost two years after *Richardson* was decided. Accordingly, his motion was not timely.

The unambiguous language of paragraph 6(4)'s main clause resolves this case. As petitioner agrees (Br. 14 "[t]he preeminent canon of statutory interpretation requires [the court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC* v. *United States*, 124 S. Ct. 1587, 1593 (2004) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)). Although paragraph 6(3) contains a second clause, it imposes a condition on the applicability of paragraph 6(3) and does not set any date other than "the date on which the right asserted [by petitioner] was initially recognized by the Supreme Court" as the date from which the one-year limitations period runs. Indeed, no other part of paragraph 6(3) even refers to any other date. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Accordingly, a prisoner like petitioner asserting a *Richardson* claim may rely on paragraph 6(3) to establish that his Section 2255 motion is timely only if he filed it within a year after June 1, 1999.

B. The "If" Clause In Paragraph 6(3) Does Not Support Running The Time Period From Any Date Other Than The Date This Court Initially Recognized The Right Asserted

Paragraph 6(3) does contain a dependent clause beginning with the word "if"—"if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." An "if" clause states a condition.[4] Accordingly, the "if" clause in paragraph 6(3) states a condition on an applicant's use of the date in that paragraph to render a petition timely. If the "newly recognized and made retroactive" condition is satisfied, then a Section 2255 applicant may make use of the "initially recognized" date of paragraph 6(1) and must rely on another provision to establish the timeliness of the Section 2555 motion. If the "newly recognized and made retroactively applicable" condition is not satisfied, the applicant may not make use of the "newly recognized" date of paragraph 6(3) and must rely on another provision to establish the timeliness of his motion. Although the "if" clause thus does establish a condition, it does not alter "the date on which the right asserted was initially recognized" by this Court.

1. Petitioner argues (Br. 19) that, if paragraph 6(3) is read to run the limitations period from "the date on which the right asserted was initially recognized by the

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[4] The pertinent definitions of "if" in *Webster's Third New International Dictionary* (1993) are "in the event that: in case," "supposing," "so long as : on condition that." *Id.* at 1124. Although a few other definitions are given as well (*e.g.*, "allowing, conceding, or granting that," "whether," "even though"), none of them is applicable here, and none of them in any event would support petitioner's argument. See also *Webster's Second New International Dictionary* 1238 (1953) ("If implies a condition.").

Supreme Court," it would "render[] entirely unnecessary" the "if" clause of the statute, in violation of the Court's "reluctance to treat statutory terms as surplusage." *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995). That criticism is not well taken. While the "if" clause cannot textually be read to change the "initially recognized" date as the date from which the one-year limitations period under paragraph 6(3) runs, it does, by stating a condition on the use of that "initially recognized" date, serve the distinct function of identifying the cases in which paragraph 6(3) is applicable. That is, the "if" clause makes clear that paragraph 6(3) applies to those cases in which the right "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." If the right is not a new right that is retroactively applicable, then the "initially recognized" date is of no significance.

In that respect, the "if" clause in paragraph 6(3) is parallel to the "if" clause in paragraph 6(2), which provides that the one-year period shall run from

> 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.

In that provision, the "if" clause similarly states a condition applicable to the use of the identified date to establish the timeliness of an application. If the applicant was *not* "prevented from making [the] motion by * * * governmental action," then the applicant may not make use of "the date on which the impediment to * * * is removed" to establish the timeliness of the application.

A court may well have implied the paragraph 6(2) condition, like the paragraph 6(3) condition, from the balance of the statutory text. Even without the "if" clause, a court could well have interpreted the date in paragraph 6(2) to be available only if an applicant had been prevented by governmental action from filing his motion. Similarly, a court would likely have interpreted the date identified in the first clause of paragraph 6(3) to be available only if the right asserted in the Section 2255 motion is retroactively applicable to cases on collateral review. Nonetheless, the "if" clause in both provisions does serve the genuine function of explicitly identifying the cases in which the identified date is available to establish the timeliness of a Section 2255 motion. Moreover, those clauses reinforce the overall structure of paragraph 6, which sets forth a general rule in paragraph 6(1) subject to potentially more generous periods that are more narrowly circumscribed.

2. In any event, although the canon that a court must "give effect, if possible, to every clause and word of a statute," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955)), is an important guide to statutory construction, the qualification "if possible" must be kept in mind. For example, even petitioner's proposal that the time for filing a Section 2255 motion runs for one year from the date that a new right has been made retroactive gives no independent force to the phrase "has been newly recognized by the Supreme Court" in the "if" clause of paragraph 6(3); to all appearances, that phrase ("newly recognized by the Supreme Court") essentially just repeats the preceding phrase ("initially recognized by the Supreme Court"). Statutes occasionally contain such surplusage. As the Court has recently explained, "[s]urplusage does not always produce ambi-

guity and [the Court's] preference for avoiding surplusage constructions is not absolute." *Lamie*, 540 U.S. at 536. If the only way to give meaning to such surplusage would be to contradict the plain meaning of the language Congress used in the balance of the statute, the correct course is to "prefer the plain meaning." *Ibid.*; see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). The plain meaning of paragraph 6(3) provides only one possible date from which the one-year limitations period runs—"the date on which the right asserted was initially recognized by the Supreme Court."

C. Although Interpretive Issues Do Arise In Construing The "If" Clause Of Paragraph 6(3), Resolution Of Those Issues Could Not Affect The Date From Which The One-Year Limitations Period Runs

Paragraph 6(3) is unambiguous with respect to the issues necessary to the disposition of this case—the date from which the limitations period runs and the one-year duration of that period. The "if" clause of paragraph 6(3), however, does raise some interpretive questions in its "made retroactively applicable" provision—in particular, the identity of the court that has to make the retroactivity ruling and whether the retroactivity ruling has to be made before the Section 2255 motion is filed. The resolution of those issues, however, could have no effect on the outcome of this case, because resolving them could, at most, render paragraph 6(3) wholly inapplicable to petitioner's Section 2255 motion. No resolution of the interpretive questions in the "if" clause could extend the date from which the limitations period runs (the date *Richardson* was decided) or provide for a longer period than the one-year period prescribed by Congress.

1. *What court may decide that the right is retroactive?*

It could be argued that, because paragraph 6(3) otherwise expressly requires that this Court "initially recognize[]" and this Court "newly recognize[]" the right asserted in the Section 2255 motion, paragraph 6(3) should be read to have implicitly required this Court to make the right retroactive as well. Under that reading, a Section 2255 motion could rely on the limitations period in paragraph 6(3) only on the basis of a ruling by this Court that the right asserted in the motion is retroactive; a ruling by some other court would be insufficient. In a footnote in its brief in *Tyler* v. *Cain*, 533 U.S. 656 (2001), the United States suggested (see 00-5961 U.S. Amicus Br. at 16 n.7) that construction of the virtually identical limitations provision applicable to state habeas petitions, 28 U.S.C. 2244(d)(1)(C).

No court, however, has adopted that view. See J.A. 23 (citing cases). The "made retroactively applicable" clause of paragraph 6(3) differs from the "initially recognized" and "newly recognized" clauses, in that the latter two clauses expressly refer to this Court ("initially recognized *by the Supreme Court*," "newly recognized *by the Supreme Court*"), while the "made retroactively applicable" clause does not. In addition, the "made retroactively applicable" clause differs from other, related provisions in which Congress expressly tied a legal consequence to a decision by this Court. See 28 U.S.C. 2244(b)(2)(A) ("made retroactive to cases on collateral review *by the Supreme Court*") (emphasis added); see also 28 U.S.C. 2255 para. 8(2) (same). The "disparate inclusion or exclusion" of the express reference to this Court, *Duncan*, 533 U.S. at 173 (quoting *Bates* v. *United States*, 522 U.S. 23, 30 (1997)), suggests

that, in all of those provisions, Congress referred to this Court expressly when it intended to refer only to rulings of this Court. Because the "made retroactively applicable" clause does not refer expressly to this Court, it may be inferred that Congress intended that any court with jurisdiction, not merely this Court, could make the right retroactively applicable for purposes of paragraph 6(3).[5] See *Ashley* v. *United States*, 266 F.3d 671, 674 (7th Cir. 2001). After *Tyler*, the United States adopted that view, with which the court of appeals (see J.A. 23) and petitioner (Br. 13) agree. See, *e.g.*, *Wiegand* v. *United States*, 380 F.3d 890, 892 (6th Cir. 2004); *United States* v. *Swinton*, 333 F.3d 481, 487 (3d Cir.), cert. denied, 540 U.S. 977 (2003).[6]

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[5] No court has adopted the proposition that the "made retroactive" decision could be reached by any court at all, such that a ruling by a single district court or court of appeals—or, perhaps, even a state court—that a new right is retroactive would satisfy the "if" clause for all Section 2255 applicants throughout the country. Nor is there any reason why Congress would have wanted to give such nationwide effect to decisions of courts that ordinarily have specific geographic jurisdiction (as do the federal courts of appeals) or jurisdiction over specific cases (as do federal district courts). Accordingly, the "made retroactive" decision is most naturally understood to require a decision by a court with jurisdiction over the particular Section 2255 motion—either this Court, the court of appeals with territorial jurisdiction over the Section 2255 motion, or the district court adjudicating the particular Section 2255 motion seeking to invoke paragraph 6(3).

[6] The Eleventh Circuit and other circuits have held that *Richardson* v. *United States*, 526 U.S. 813 (1999), should be applied retroactively on collateral review to cases that had become final before *Richardson* was decided. J.A. 23-24 (citing cases). In circuits in which the issue is open, the government has consistently taken the position that *Richardson* should not be applied retroactively because it does not "alter[] the range of conduct or the class of persons that the law punishes," *Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2523 (2004), and does not otherwise come within an

2. *When may a court decide that the right is retroactive?*

Another, more difficult interpretive issue arising from the "if" clause of paragraph 6(3) concerns whether the retroactivity ruling must precede the filing of an applicant's Section 2255 motion or whether, instead, the retroactivity ruling could be made by a court ruling on an applicant's own Section 2255 motion. Although the question is not free from difficulty, the latter interpretation is correct.

a. Although the "made retroactive" provision does not have a tense marker of "was" or "is" associated with it, the most natural reading is to extend the past tense of the first part of the "if" clause—"*has been* newly recognized by the Supreme Court"—to the second part—"and made retroactively applicable to cases on collateral review." It could therefore be argued that the date defined in paragraph 6(3) is available only if the right asserted in the Section 2255 motion "has been * * * made" retroactive before the motion was filed. Petitioner appears to adopt this view, when he argues (Br. 17) that "paragraph 6(3) does not reset the limitation clock unless a prisoner can show that a court 'already had made' the right asserted retroactive to collateral cases." See NACDL Amicus Br. 7 (similar).

That reading of the "if" clause would be consistent with the text of paragraph 6(3). It would also be consistent with this Court's construction in *Tyler* v. *Cain*,

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exception to the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989). This case, however, does not present any question concerning the retroactivity of *Richardson*, because the government has not sought to defend the court of appeals' judgment on the alternative ground that *Richardson* is not retroactive and the conflict in the circuits on which the petition was based concerns the meaning of paragraph 6(3), not the retroactivity of *Richardson*.

supra, of a somewhat similarly worded provision governing second or successive habeas petitions. Under that provision, "[a] claim presented in a second or successive habeas corpus application * * * shall be dismissed unless * * * the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A). The Court in *Tyler* held that, under that provision, "the District Court was required to dismiss [the second or successive habeas petition] unless [the prisoner] showed that this Court *already had made*" the new rule retroactive. 533 U.S. at 667 (emphasis added). A similar reading of "made retroactively applicable" in paragraph 6(3) would lead to the conclusion that a Section 2255 motion is untimely under paragraph 6(3) unless, at the time it is filed, a court already had made the new right retroactively applicable.

b. Although the Court could construe the "if" clause in paragraph 6(3) to require a holding of retroactivity before the Section 2255 motion is filed, that construction is ultimately in substantial tension with other parts of the statute. Section 2255 provides expressly that "[a] 1-year period of limitation shall apply to a motion under this section" and that "[t]he limitation period shall run from the latest of" the four events mentioned in the four subparagraphs of paragraph 6. Congress thereby intended a nationally uniform, one-year period for filing Section 2255 motions. Reading paragraph 6(3) to require a holding of retroactivity before a prisoner could file a Section 2255 motion, however, would conflict with that congressional goal. That is because of the unlikelihood that a court will be presented with the question of the retroactivity of a new rule—and will therefore have the opportunity to decide that it is retroactive—

immediately after the new rule is first recognized by this Court.

This Court is unlikely to hold a new right retroactive within a year of initially recognizing the right. It is possible, as the Court recognized in *Tyler*, that "the right combination of holdings" by this Court could "necessarily dictate retroactivity of the new rule" at the very time the Court initially recognizes the rule. 533 U.S. at 666; see *id.* at 669-670 (O'Connor, J., concurring); *id.* at 671-673 (Breyer, J., dissenting).[7] Aside from such exceptionally rare occurrences, however, it is very unlikely that cases could make it through the system on collateral review fast enough for this Court to reach a retroactivity ruling within a year of first recognizing the new rule.

The courts of appeals are also unlikely to hold a new right retroactive within a year of this Court's initial recognition of the right. To be sure, every prisoner has the one-year period in paragraph 6(1) from the date his conviction became final to file a timely Section 2255 motion. Thus, a prisoner whose conviction became final shortly before or shortly after this Court announces a new rule could make use of that period to file a Section 2255 motion in district court based on the new rule. But even such a motion is unlikely to reach and be adjudi-

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[7] It is also possible that this Court could recognize a new right and hold it retroactive in a case in which the new right is presented to the Court in a case arising from a Section 2255 motion. In the federal system, however, that occurrence will be very rare. If the prisoner raised the claim on direct review and there has been no intervening change in the governing law, the court on Section 2255 will ordinarily reject the claim on law of the case or related grounds, while if the prisoner did not raise the claim on direct review, it will ordinarily be barred by the prisoner's procedural default. See *Withrow* v. *Williams*, 507 U.S. 680, 720-721 (1993) (Scalia, J., concurring in part and dissenting in part) (citing cases).

cated by a court of appeals within one year of this Court's decision recognizing the new rule.[8]

Assuming that paragraph 6(3) requires the retroactivity ruling to precede the filing of the Section 2255 motion, the result would be as follows: In the extraordinary situation in which this Court in effect holds a new rule retroactive in the case in which it is first announced, prisoners throughout the country would have the statutory period of one year from this Court's decision to file a Section 2255 motion. In all other cases, however, there would be either no time at all or there would be non-uniform periods of less than one year governing Section 2255 motions asserting the new right, depending on the circuit. Ordinarily, a prisoner would have no time at all to file a Section 2255 motion based on the new rule, because, as explained above, neither this Court nor the court of appeals with jurisdiction over the prisoner's Section 2255 motion will likely have had the opportunity to hold a new rule retroactive within one year of the new rule's announcement by this Court. Where a given circuit had been presented with a case raising the retroactivity issue and held the new right retroactive within a year of this Court's initial recognition of the new right, however, a prisoner in that circuit would have some period for filing a Section 2255 motion. But that period would be

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[8] Although a district could easily make a retroactivity decision regarding a new rule within one year of the rule's announcement by this Court, decisions by a single district court are not binding in other cases—even within the same district. See 18 James Wm. Moore et al., *Moore's Federal Practice* ¶ 134.02[1][d] (3d ed. 2004). A district court's holding in a given case that a new rule is retroactive would therefore not provide a basis for anyone other than the party in that particular case to claim that the rule has been "made retroactive" under paragraph 6(3). Cf. note 5, *supra*.

likely to be much less than a year: it would run from the date of the circuit's retroactivity holding to the termination of the limitations period one year after this Court initially recognized the new right. Thus, the nationally uniform one-year period Congress envisioned in paragraph 6(3) would be either non-existent or, if it existed at all in some circuits, it would be a period of likely much less than a year and would vary depending on whether and when the particular circuit made a retroactivity decision.

As the court of appeals recognized, that result appears to be inconsistent with Congress's express provision for a "single, uniform statute of limitations" of one year. J.A. 29. Accordingly, the better view is that the "if" clause of paragraph 6(3) is satisfied so long as the newly recognized right is held to be retroactive by some court with jurisdiction over the petition—this Court, the court of appeals with territorial jurisdiction, or the court making the final decision in the particular applicant's own case. Each prisoner seeking to rely on a new rule would have the same, nationally uniform one-year period from the date of initial recognition of the rule by this Court to file a Section 2255 motion. See J.A. 27.

3. The date specified in the main clause is unaffected.

It bears emphasis that, however the interpretive questions arising from the "if" clause of paragraph 6(3) are resolved, the question presented in this case would not be affected. The interpretation of the "if" clause could affect whether a given Section 2255 applicant may rely on the paragraph 6(3) limitations period at all, *i.e.*, whether an applicant who *did* file within one year from "the date on which the right asserted was initially recognized by the Supreme Court" may rely on

paragraph 6(3) to establish the timeliness of his motion. But no interpretation of the "if" clause could save an applicant who *did not* file his Section 2255 motion within one year of the date the right was initially recognized by this Court. The clear text of paragraph 6(3) identifies that date as the one and only date from which to run the one-year period. The "if" clause sets a condition on the use of that date but does not authorize the use of any other date. Accordingly, no construction of the "if" clause could authorize a Section 2255 motion filed more than one year after initial recognition of a new right by this Court.

D. The Fact That Many Second Or Successive Section 2255 Motions May Be Time-Barred Is Not A Reason To Disregard The Text Of Paragraph 6(3)

Petitioner and his amici argue that running the limitations period from the date this Court initially recognizes a new right will "negatively impact a petitioner's ability to file a successive petition." NACDL Amicus Br. 9; see Pet'r Br. 23-26. A second or successive petition must be dismissed under 28 U.S.C. 2255 para. 8(2) unless it is certified to be based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In *Tyler* v. *Cain*, this Court construed virtually identical language applicable to second or successive habeas petitions by state prisoners under 28 U.S.C. 2244(b)(2)(A) to require a district court to dismiss such a petition "unless [the prisoner] showed that this Court already had made [the rule relied upon] retroactive" at the time the petition was filed. 533 U.S. at 667. Petitioner and his amici argue that this Court will very rarely have the chance to decide that a new rule is retroactive within one year of initially recognizing it. They conclude that second or successive motions

will therefore either be dismissed under paragraph 8(2) (because this Court has not yet held the right asserted to be retroactive) or found untimely under paragraph 6(3) (because the prisoner waited for a retroactivity ruling by this Court that came more than one year after this Court initially recognized the right asserted).

As petitioner acknowledges and as already noted, there could be instances in which, by a combination of two decisions or otherwise, this Court in effect makes a new rule retroactive at the same time that it announces the rule. See p. 21 & note 7, *supra*. There may be other circumstances as well in which litigation moves forward with sufficient speed (or, perhaps, in which the relevant retroactivity issues are raised by already-pending Section 2255 motions) that a prisoner on a timely second or successive Section 2255 motion is able to obtain relief under paragraph 8(2).

The important point, however, is that very limited availability of relief on second and successive Section 2255 motions results from a "balancing of objectives (sometimes controversial), which is normally for Congress to make," between the competing goals of finality and collateral relief. *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996); see *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996). In deciding that such second or successive motions should be narrowly limited, Congress likely recognized, as had Justice Harlan, that "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U.S. 667, 691, (1971) (Harlan, J., concurring in the judgments in part and dissenting in part). Congress is entitled to base its limitations policy for second and

successive Section 2255 motions on that judgment and on the reality that even claims that are given retroactive effect could have been raised on direct review. The fact that paragraph 6(3) has the effect of severely restricting such motions is not an objection to the plain-meaning construction of that provision; it is, rather, a reflection of the balance that Congress struck.

E. The Limitations Period In Paragraph 6(3) Of One Year From The Date When This Court Initially Recognizes A New Right Is Based On Sound Policy Considerations

1. Statutes of limitations are based on the "basic policies of * * * repose, elimination of stale claims, and certainty." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). As this Court has long understood, permitting a claim to be "brought at any distance of time" would be "utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

The finality interests underlying statutes of limitations are of particular importance to collateral review of criminal convictions. This Court has frequently noted the "profound societal costs" of collateral review of criminal convictions. *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Many of those costs have to do with the extended period for litigation afforded by collateral review. Collateral review "extends the ordeal * * * for both society and the accused." *Engle* v. *Isaac*, 456 U.S. 107, 127 (1982). It frustrates deterrence and rehabilitation, because effective deterrence depends on the expectation that punishment will be swift and sure, and successful rehabilitation requires the defendant to accept that he is justly subject to sanction and needs to be rehabilitated. *Id.* at 127 n.32. And "writs of habeas corpus frequently cost society the right to punish

admitted offenders," because the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Id.* at 127-128; see *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991). While a grant of collateral relief "may, in theory entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Isaac*, 456 U.S. at 128.

2. Taking into account those costs, the one-year limitations period in Section 2255 was intended to "reduce[] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan* v. *Walker*, 533 U.S. at 179. Because "[f]inality is essential to both the retributive and the deterrent functions of criminal law," *Calderon*, 523 U.S. at 555, Congress determined that, although collateral review of federal criminal convictions should continue to be available, a reasonable one-year limitation period would ensure that the costs of collateral review are lessened by requiring reasonably prompt litigation of collateral claims.

Paragraph 6(3) embodies Congress's drawing of the appropriate balance. In addition to the ordinarily applicable one-year period after a conviction has become final under paragraph 6(1), paragraph 6(3) authorizes a further one-year period within which to bring Section 2255 motions based on a new right recognized by this Court after the defendant's conviction has become final. Congress determined that this Court's recognition of the new right may be sufficiently extraordinary to warrant reopening the finality of criminal convictions. In recognition of the severe costs of such long-delayed litigation, however, Congress retained the one-year

provision so that even litigation about the application of new rules will, with time, come to an end.

3. Petitioner's view that the one-year period runs from the date the right asserted is held to be retroactive would extend the time period for litigating already-old claims even further. It may take years—sometimes many years—before a court of appeals or this Court has the opportunity to decide whether a given newly recognized right is retroactive. Under petitioner's view, prisoners could wait that entire time —and then an additional year after the retroactivity holding—before they would have to file their Section 2255 petitions.[9] Moreover, the amount of time each prisoner could wait would vary by circuit, depending on when each circuit decides the retroactivity issue.

As the court of appeals recognized, Congress could have enacted a limitations period running from "the date on which a right newly recognized by the Supreme Court has been made retroactively applicable on collateral review." J.A. 26. But Congress's decision to require more timely filing of Section 2255 motions, based on the date the right was "initially recognized" by this Court, helps achieve the important goal of minimizing the heavy costs of such long-delayed litigation. That decision should be respected.

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[9] Indeed, as petitioner and amicus NACDL appear to recognize, it is likely that, under petitioner's view of the "if" clause, most prisoners would *have* to wait until the right is held to be retroactive before filing a Section 2255 motion. See Pet'r Br. 17 ("[P]aragraph 6(3) does not reset the limitation clock [from the ordinary one-year-from-finality-of-conviction period] unless a prisoner can show that a court 'already had made' the right asserted retroactive to collateral cases."); NACDL Amicus Br. 26-27. It appears that the Section 2255 motion in this case, which was filed *before* the Eleventh Circuit held *Richardson* retroactive, would itself be untimely under petitioner's theory.

4. Petitioner advances a number of policy arguments, which essentially reduce to the contention that Congress should have drafted paragraph 6(3) differently to authorize a more relaxed time limit for filing Section 2255 motions based on newly recognized rights. As the Court has recognized, however, the AEDPA's limitations provisions reflect Congress's "legislative decision to establish stringent procedural requirements for retroactive application of new rules," and the Court "do[es] not have license to question the decision on policy grounds." *Tyler*, 533 U.S. at 663 n.5. Moreover, even as a matter of policy, Congress had substantial reasons not to adopt petitioner's proposal, which would authorize significant delay in bringing Section 2255 motions.

a. Petitioner argues (Br. 27) that his proposal—in which the limitations period runs from a decision holding a right to be retroactive—"provides for the possibility that the lower courts may make an incorrect retroactivity decision." Because prisoners could—or, indeed, would have to—await a decision that a new rule is retroactive before filing a Section 2255 motion, they would never find themselves in the situation of being bound by an unfavorable retroactivity decision in their own case that turns out to be mistaken. Petitioner argues that, if the limitations period instead runs from "the date on which the right asserted was initially recognized by the Supreme Court," 28 U.S.C. 2255 para. 6(3), prisoners may be forced to file their Section 2255 motions before the court of appeals or this Court has held the new rule at issue to be retroactive; prisoners may therefore become bound by an ultimately incorrect and transitory ruling that the new right is not retroactive.

Petitioner's argument is mistaken, for two reasons. First, while petitioner's proposal could indeed protect prisoners from mistaken non-retroactivity holdings, it would do so only by imposing a corresponding cost: petitioner's proposal would delay (sometimes by years) relief for those prisoners who are obviously entitled to relief under a new rule that should be held retroactively applicable. Such prisoners would have to wait until the new rule is held to be retroactive by the court of appeals or this Court before they could rely on paragraph 6(3) to establish that their filing is timely. Yet it is just those prisoners whom Congress was most likely to be concerned about in structuring paragraph 6(3) as it did.

Second, the "cost" petitioner hypothesizes is simply the cost of any rule that ultimately requires the termination of litigation by according finality, at some point, to the judicial resolution of a case. Under any rule of limitations—or any other rule that promotes finality and repose—some parties who ultimately could prevail on the basis of a new legal rule will be bound by the results of their earlier litigation or their earlier failure to litigate. In enacting paragraph 6(3) and many other provisions of AEDPA, Congress chose not to pursue the value of ultimate accuracy at all costs. Rather, it balanced the value of finality against the value of permitting continued litigation. The fact that paragraph 6(3) will lead to a termination of litigation over even new rules is not a reason to question the terms of that provision; rather it is a statement of the very purpose that Congress sought to achieve in enacting paragraph 6(3).

b. Petitioner also argues that running the one-year limitations period from the date of a decision holding a new right to be retroactive would "curb frivolous applications for collateral relief" based on rights that may

never be held to be retroactive. Br. 28. Running the period from the date this Court initially recognizes a new right, in petitioner's view, would "encourage[] federal prisoners to file potentially frivolous section 2255 motions every time this Court issues a decision," because they will otherwise fear forever losing the ability to obtain relief. Br. 29; see NACDL Amicus Br. 21-28.

Running the one-year limitations period in paragraph 6(3) from the date this Court initially recognizes a new rule ensures that all claims based on the new rule are brought reasonably promptly after the rule is announced. Although that could result in some frivolous claims being brought based on rules that are clearly not retroactive, it will have the benefit of allowing the courts to decide the retroactivity issue promptly. Moreover, prisoners already have substantial incentives to bring Section 2255 motions whenever possible in the hope of obtaining shorter sentences or invalidating their convictions. Many such claims will therefore be brought, regardless of which rule the Court adopts in this case. The courts are likely not to have great difficulty disposing of frivolous applications for collateral review. But requiring all claims based on a given new rule to be brought promptly has the benefit of ensuring that the legal issues arising from the announcement of a new rule, including its retroactivity, are addressed and disposed of relatively quickly. Those entitled to relief may thereby receive it promptly, and the criminal justice system can otherwise return to achieving goals other than the relitigation of convictions that have long since become final.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
ELIZABETH A. OLSON
Attorney

FEBRUARY 2005

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Paragraph 6 of Section 2255 of Title 28 of the United States Code provides as follows:

> 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;
>
> (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.

2. Paragraph 8 of Section 2255 of Title 28 of the United States Code provides as follows:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.