No. 19-5154

In the Supreme Court of the United States

JAMES WARDELL QUARY, PETITIONER,

v.

N.C. ENGLISH, RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government concedes that the 9-2 split on the scope of the savings clause in 28 U.S.C. § 2255(e) is entrenched, important, and warrants certiorari. Indeed, the government sought this Court's review of this very issue barely a year ago in *United States v. Wheeler*, No. 18-420. The government does not suggest that the need for review has become any less urgent in the intervening months. Nor does the government dispute that all of the traditional criteria for certiorari are satisfied here.

Instead, the government cites purported vehicle problems (in this and every other pending petition raising this split) in an apparent effort to convince this Court to wait to take up the question until the government petitions from a decision of its choice. But these vehicle problems are manufactured. The question presented is simply whether a prisoner may seek habeas relief under 28 U.S.C. § 2241 to raise a claim that his conviction is unlawful, if at the time of his original § 2255 petition his argument was foreclosed by erroneous circuit precedent that has since been overturned. It is indisputable that that question was squarely decided and outcome-determinative here.

Indeed, this is an ideal vehicle to resolve the split. The decision overturning the adverse precedent that barred petitioner's original § 2255 petition came from this Court, not from any lower court. *See Rosemond v. United States*, 572 U.S. 65 (2014). There is no dispute that the jury instructions underlying petitioner's aiding and abetting conviction were erroneous under *Rosemond* because they did not require any showing that he had advance knowledge that his confederate intended to use a gun. Petitioner thus was convicted of conduct that, under *Rosemond*, is not a crime.

And the unlawful conviction matters. Petitioner was convicted of violating 18 U.S.C. § 924(c), which carries a mandatory 5-year *consecutive* sentence. If petitioner were imprisoned in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, or D.C. Circuits, he could bring a § 2241 petition to invoke this Court's clear precedent in *Rosemond*, to challenge his unlawful conviction, and to serve 5 fewer years in prison. This is exactly the relief that § 2255(e)'s savings clause is intended to save. The persistent lack of unanimity in the circuits is intolerable and this Court should resolve it.

I. There is an Entrenched Circuit Split Warranting Certiorari

The United States acknowledges the entrenched, 9-2 circuit split on the scope of the savings clause in 28 U.S.C. § 2255(e). Opp. 9, 17-18. In *Wheeler*, the United States described the split as a "widespread circuit conflict" that "has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance." Pet. for Certiorari at 12-13, *United States v. Wheeler*, No. 18-420 (Oct. 3, 2018). In its opposition here, the United States reiterates that the split remains "important[t]." Opp. 18.

There is no disputing that this petition squarely presents the split. In the decision below, the Tenth Circuit adhered to its decision in *Prost v Anderson*, 636 F.3d 578 (10th Cir. 2011), and held that petitioner's § 2241 petition was procedurally barred because he could have raised his challenge to the aiding and abetting instructions in his initial § 2255 motion—even though the challenge was foreclosed at that time by Tenth Circuit precedent. Reply App. 3a-4a.[1] The Tenth Circuit acknowledged that

[1] A complete version of the Tenth Circuit decision is reprinted in an appendix attached to this reply.

petitioner's jury instructions were erroneous under *Rosemond*, that circuit precedent at the time of petitioner's initial habeas petition foreclosed the *Rosemond* argument, and that the *Rosemond* error was prejudicial. But the Tenth Circuit held that, because petitioner could have raised a futile challenge to circuit precedent, his original § 2255 motion was not "inadequate or ineffective." Reply App. 4a.

Nine circuits have rejected the Tenth (and Eleventh) Circuit's reading. And as the government acknowledges, all of them would hold that habeas relief is available at least to an individual who can point to a change in applicable law that establishes that his conduct was not a crime. Opp. 17-18. That is precisely petitioner's situation.

This conflict easily merits an exercise of this Court's certiorari jurisdiction. As the government explained in *Wheeler*, the "conflict in the court of appeals" will not "resolve itself," and "[o]nly this Court's intervention can provide the necessary clarity." *Wheeler* Pet. 13. The circuit disagreement is "particularly problematic because habeas petitions are filed in a prisoner's district of confinement …, meaning that the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons." *Wheeler* Pet. 25. And the government told this Court in 2018 that review was imperative "now." *Wheeler* Pet. 29. It is no less imperative in 2019.

The government contends that the denial of certiorari in *Wheeler* somehow counsels against certiorari here, even though the government acknowledges the "importance" of the split. Opp. 18. But there were prohibitive, fatal vehicle problems in *Wheeler*. In particular, the case was moot. The petitioner in *Wheeler* was released from prison before the Court acted on the peti-

tion, and his claim of error went exclusively to the length of his sentence. Even his original sentence would have expired before the Court could hear argument. Letter from Solicitor General to Clerk of the Court at 1, *Wheeler*, No. 18-420 (Feb. 28, 2019) (noting that petitioner had been released early *and* original sentence would expire in October 2019); Letter from Respondent to Clerk of the Court at *Wheeler*, No. 18-420 (Mar. 1, 2019). Further, in *Wheeler* the government had changed its position on the scope of § 2255(e) in the middle of the case, presenting a waiver issue.

In short, the § 2255(e) question easily satisfies this Court's criteria for certiorari review, *Wheeler* does not counsel otherwise, and there is no reason to wait.

II. This Petition Presents an Ideal Vehicle to Resolve the Split

This case is an ideal vehicle to resolve the circuit conflict. The government invents two illusory vehicle problems in an effort to convince this Court to deny review. Opp. 18-22. Neither would prevent this Court from reaching the question presented or even affect the Court's consideration of that question.

1. The split on the scope of § 2255(e) is squarely presented and was outcome determinative in the court below. The Tenth Circuit denied petitioner's § 2241 petition as procedurally barred, on the sole ground that adverse circuit precedent does not render a § 2255 petition "inadequate or ineffective." Pet. App. 4a.

By contrast, petitioner's § 2241 petition would *not* be procedurally barred in the nine other circuits that hold that adverse circuit precedent *does* render a § 2255 petition "inadequate or ineffective." And there is no dispute that at the time of petitioner's original § 2255 petition, Tenth Circuit precedent foreclosed any argument that the district court gave erroneous aiding-and-abetting in-

structions on the § 924(c) count. *See United States v. Wiseman*, 172 F.3d 1196 (10th Cir. 1999). There is no dispute that this Court's decision in *Rosemond* overruled Tenth Circuit precedent and concluded that the aiding-and-abetting instructions in petitioner's case permitted him to be convicted of conduct that is not a crime. And there is no dispute that the government failed at trial to present the evidence that *Rosemond* requires, namely that petitioner had "advance knowledge that a confederate would use or carry a gun during the … commission" of the crime of violence underlying the § 924(c) charge. *Rosemond*, 572 U.S. at 67. The government argues (Opp. 12) that petitioner could have asked the Tenth Circuit to overrule its panel precedent, but whether that option bars a subsequent § 2241 petition is precisely the issue on which the courts of appeals are split.

2. This petition is an ideal vehicle for a second reason: it involves a defect in the jury instructions that pertained to a substantive count of conviction, namely, the unlawful aiding and abetting instructions that permitted the jury to convict petitioner of aiding and abetting a violation of § 924(c) based on conduct that is not a crime under § 924(c). The United States has contended that, even if § 2255(e)'s savings clause permits habeas petitions under § 2241 in light of reversed precedent in some cases, the savings clause would not extend to an error in calculating a sentence, so long as the sentence is within the statutory range. *See, e.g.*, *Wheeler* Pet. 21. But the United States does not dispute that, if § 2255(e)'s savings clause extends to *some* habeas petitions that would otherwise be barred by § 2255(h), it would extend to situations where "a defendant has been convicted of conduct that the law does not make criminal." *Wheeler* Pet. 21. Such an error, the United States acknowledged, would constitute a "fundamental defect." *Wheeler* Pet. 21. That is exactly petitioner's situation.

3. Petitioner's § 2241 petition rests on a change in law resulting from a decision of this Court, not any lower court. That means that there is no doubt as to the illegality of the conviction, and that this petition does not present questions the government has identified in other pending petitions raising the question presented. *See* U.S. Brief in Opposition at 21-23, *Jones v. Underwood*, No. 18-9495 (urging denial of certiorari on the ground that neither circuit of confinement nor conviction had recognized the claim of error); U.S. Brief in Opposition at 16, *Walker v. English*, No. 19-52 (urging denial of certiorari on the ground that the circuit of confinement had not recognized claim of error). There is no doubt that this petition presents a qualifying "change in law."

4. The government manufactures two vehicle problems that do not withstand scrutiny.

The government argues that petitioner cannot show that his claim was foreclosed under Tenth Circuit precedent "at the time of his sentencing." Opp. 19. The government notes that the Tenth Circuit's *Wiseman* decision, which erroneously held that aiding and abetting liability under § 924(c) did not require advance knowledge, issued in 1999, after petitioner's sentencing. But *Wiseman* itself understood the aiding and abetting argument to be barred by a prior Tenth Circuit precedent decided in 1995, well before petitioner's trial commenced. *Wiseman*, 172 F.3d at 1217 (relying on *United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995)).

More important, whether Tenth Circuit precedent foreclosed petitioner's claim at the time of sentencing is irrelevant. There is no dispute that Tenth Circuit precedent foreclosed petitioner's claim at the time that he filed his first § 2255 motion, in 2000. Given that the question presented is whether "remedy by [§ 2255] *motion* is inadequate or ineffective" when controlling circuit prece-

dent foreclosed a claim, *see* 28 U.S.C. § 2255(e) (emphasis added), it is the existence of preclusive precedent at the time of the § 2255 motion that matters, not at the time of sentencing.

The government puzzlingly asserts that the circuits that "have adopted the most prisoner-favorable view of the saving clause … generally require a prisoner to show … that his claim was foreclosed by (erroneous) precedent at the time of sentencing, direct appeal, and a first motion under Section 2255." Opp. 19. That is wrong, and the very cases the government cites (at Opp. 19) belie the government's claim. *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), holds that a petitioner can come within § 2255(e)'s savings clause by citing a new statutory interpretation decision that "could not have been invoked in the initial § 2255 motion." *Id.* at 595. And *Wheeler* simply held that "the retroactive change in law could not have occurred before direct appeal or the initial § 2255 petition." 886 F.3d at 429 (emphasis added). Here the change in law occurred in *Rosemond* in 2014, well after petitioner's initial § 2255 petition.

Petitioner is not aware of any circuit on petitioner's side of the split that has concluded that § 2255(e) does not apply when a claim was (1) foreclosed by adverse precedent at the time of the initial § 2255 motion, but (2) available at the time of sentencing. Indeed, even the Tenth Circuit recognized that the "relevant metric" based on the *text* of § 2255(e) "is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion." Reply App. 3a (quoting *Prost*, 636 F.3d at 584). The Tenth Circuit disagrees with the majority of circuits on the circumstances in which an argument is unavailable, but not on the question of *when* the argument must be unavailable. Nor would a contrary conclusion make any sense given that many § 2241 claims arise in an ineffective assistance

of counsel posture and are necessarily brought in habeas rather than on direct review.

The government also speculates that the jury may have convicted petitioner of violating § 924(c) on a *Pinkerton* conspiracy theory rather than on the erroneous aiding and abetting theory. Opp. 20. Of course, this is disputed, not "undisputed." Opp. 20. More important, it is irrelevant for present purposes. The question presented here is whether a § 2241 petition is procedurally barred from the get-go. The government's new argument was not addressed in the decision below, which never even mentioned *Pinkerton*. Reply App. 1a-4a. The Tenth Circuit dismissed on the sole ground that § 2255 categorically forbids habeas petitions like petitioner's because he could have asked the Tenth Circuit to overrule its prior precedent at the time of his initial habeas petition. In other words, this case squarely presents the issue over which the circuits are split, namely the reach of the § 2255(e) savings clause.

The government's *Pinkerton* argument does not go to the reach of § 2255(e) or to a court's ability to *hear* a § 2241 petition (the subject of the split), but to whether the standards of § 2241 have been satisfied. The government essentially argues that petitioner is not "in custody in violation of the Constitution or laws or treaties of the United States," § 2241(c)(3), because the jury might have convicted him on a *Pinkerton* theory. But this is not a "vehicle problem" because it will not prevent this Court from resolving the question presented or the split. If this Court reverses, it will remand to the Tenth Circuit, which may consider any additional arguments that the government has not waived.

In any event, if this Court reverses and holds that the savings clause allows § 2241 petitions where a prior § 2255 petition was foreclosed by adverse circuit prece-

dent, on remand petitioner would be entitled to a new trial on his § 924(c) conviction. The government does not dispute that it failed to present evidence at trial satisfying *Rosemond*, and that petitioner is actually innocent of the charge of aiding and abetting a § 924(c) violation. Instead, the government argues that the evidence was *sufficient* to convict petitioner on an alternative conspiracy theory, citing the district court's rejection of a motion for acquittal on sufficiency grounds. Opp. 20 (citing *United States v. Quary*, 1997 WL 447679, at *8 (D. Kan. June 6, 1997)). But "constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory." *Skilling v. United States*, 561 U.S. 358, 414 (2010). The government does not contend that the jury *necessarily* convicted petitioner under a conspiracy theory. The *Rosemond* error was prejudicial, not harmless.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-3212
(D.C. No. 5: 18-CV-03158-SAC) (D. Kan.)

JAMES WARDELL QUARY,

Petitioner - Appellant,

v.

N.C. ENGLISH,

Respondent - Appellee.

ORDER AND JUDGMENT[*]

Before HOLMES, MATHESON, and EID, Circuit Judges.

Pro se federal prisoner James Quary appeals from the dismissal of his application for a writ of habeas corpus under 28 U.S.C. § 2241.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the dismissal.[2]

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Quary is pro se, we liberally construe his filings but do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

[2] A federal prisoner is not required to obtain a certificate of appealability to seek review of a district court's denial of a habeas

I. BACKGROUND

Mr. Quary was convicted in 1997 of federal drug and firearms offenses. He was sentenced to life in prison for the drug crimes and to an additional 60 months for the gun offense. This court affirmed his convictions on direct appeal. *United States v. Quary*, 188 F.3d 510 (10th Cir. 1999) (unpublished). The district court denied his first motion for habeas relief under 28 U.S.C. § 2255 and we denied a certificate of appealability ("COA"). *United States v. Quary*, 60 F. App'x 188 (10th Cir. 2003) (unpublished). The court later reduced his life sentence to 360 months under 18 U.S.C. § 3582(c). Mr. Quary filed a second § 2255 motion, which the district court dismissed as an unauthorized second or successive motion. We denied a certificate of appealability to appeal that decision. *United States v. Quary*, 881 F.3d 820 (10th Cir. 2018).

In June 2018, Mr. Quary filed his § 2241 application underlying this appeal. He argued his firearms conviction under 18 U.S.C. § 924(c) should be vacated because the aiding and abetting jury instructions at trial were erroneous under *Rosemond v. United States*, 572 U.S. 65 (2014).[3] The district court said this claim must be raised in a § 2255 motion unless § 2255(e)'s savings clause permitted him to bring his claim under § 2241. The court concluded the savings clause did not apply and dismissed the § 2241 application.

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application under § 2241. *Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015).

[3] In *Rosemond*, the Supreme Court held that an unarmed accomplice cannot aid and abet a § 924(c) violation without knowing beforehand "that one of his confederates will carry a gun." 572 U.S. at 77.

II. DISCUSSION

A § 2255 motion is ordinarily the only means to challenge the validity of a federal conviction following the conclusion of direct appeal. *Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011). But "in rare instances," *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010), a prisoner may attack his underlying conviction by bringing a § 2241 habeas corpus application under the "savings clause" in § 2255(e). *Brace*, 634 F.3d at 1169. That clause provides:

> An application for a writ of habeas corpus [(§ 2241)] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section [(§ 2255)], 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 [(§ 2255)] is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). "Thus, a federal prisoner may file a § 2241 application challenging the validity of his sentence only if § 2255 is inadequate or ineffective to test the legality of his detention." *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016) (quotations omitted).

A § 2241 applicant "bears the burden of showing he satisfies § 2255(e)." *Id.* at 1170. "The relevant metric or measure" for application of § 2255(e) "is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion." *Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011). If the argument could have been tested in an initial § 2255 motion, "then the petitioner may not

resort to the savings clause and § 2241." *Id.* We have identified only two examples in which § 2255 was inadequate or ineffective: (1) when the sentencing court has been abolished, or (2) "when the application of § 2255(h)'s bar against a second or successive motion for collateral review would seriously threaten to render the § 2255 remedial process unconstitutional." *Hale*, 829 F.3d at 1173-74 (quotations omitted).

Mr. Quary does not contend his case meets either of the *Prost* exceptions. As in the district court, he concedes that, under *Prost's* interpretation of § 2255(e), he cannot rely on *Rosemond* to proceed under § 2241. In *Prost*, this court held that, after denial of a § 2255 motion, new case precedent construing the law to render a conviction invalid would not satisfy § 2255(e)'s savings clause. This is so because, even if the new case—here *Rosemond*—provides a basis to challenge the conviction, the prisoner "was entirely free to raise and test a *[Rosemond]-type* argument in his initial § 2255 motion." *Prost*, 636 F.3d at 590.

On appeal, Mr. Quary argues that *Prost* was wrongly decided. But, as he seems to acknowledge, "[o]ne panel of the court cannot overrule circuit precedent." *United States v. Walling*, 936 F.2d 469, 472 (10th Cir. 1991), and "[a]bsent an intervening Supreme Court or en banc decision justifying such action, we lack the power to overrule [a prior panel decision]." *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985 (10th Cir. 1996). Mr. Quary argues that this case should be heard en banc. Aplt. Br. *passim.* He asks this panel to vacate the district court's dismissal of his § 2241 application "and/or" grant en banc review "to revisit *Prost v. Anderson.*" *Id.* at 24.

As previously explained, we cannot vacate the district court's dismissal because *Prost* binds this

panel. We cannot grant en banc review because the en banc court must make that decision under Federal Rule of Appellate Procedure 35(a). Mr. Quary may petition for rehearing en banc under Federal Rule of Appellate Procedure 35(b).

The district court granted Mr. Quary's request to proceed *in forma pauperis* (*ifp*) conditioned on his making partial payments of the filing fee. The provision for partial payment appears in 28 U.S.C. § 1915(b), which is part of the Prison Litigation Reform Act ("PLRA"). The PLRA does not apply to § 2241 appeals. *McIntosh v. U.S. Parole Comm.*, 115 F.3d 809 (10th Cir. 1997). Accordingly, the district court does not need to assess and should not assess partial payments under § 1915(b). We therefore vacate the portions of the district court's order that conditioned Mr. Quary's *ifp* status on his making partial payments of the filing fee.

III. CONCLUSION

We affirm the district court's dismissal of Mr. Quary's § 2241 application. We vacate the partial payment portions of the district court's *ifp* order as described above.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge