NO. 19-7386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

JACK DOWELL,

Petitioner,

VS.

RICHARD HUDGINS, Warden-FCI Englewood

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JACK DOWELL #05225-017
PRO SE REPRESENTATION
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QUESTIONS PRESENTED FOR REVIEW

Where the district court dismissed Mr. Dowell's §§2241 and 2255(e) habeas petition claiming the savings clause does not apply to Mr. Dowell, in light of the Tenth Circuits precedence in *Prost*, which is in direct conflict with eight other circuit court of appeals decisions should this court exercise it supervisor power and resolve the conflict?

Was Mr. Dowell denied due process where the jury instructions relieved the prosecution of its burden of proof in light of *Marinello* rendering his conviction unconstitutional and revealing that Mr. Dowell is actually innocent and does *Marinello* apply retroactively to cases on collateral review and did the court's below decision constitute a suspension of the great writ?

Whether the district court's failure to comply with this Court's precedence in *Bousely* by denying Mr. Dowell habeas corpus petition without conducting an evidentiary hearing to afford Mr. Dowell an opportunity to prove he is actually innocent of Count Two constitutes a violation of due process?

PARTIES TO THE PROCEEDINGS

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GROUND TWO

Was Mr. Dowell's denied due process where the jury instructions relieved the prosecution of its burden of proof in light of *Marinello* rendering his conviction unconstitutional and revealing that Mr. Dowell is actually innocent and does *Marinello* apply retroactively to cases on collateral review and did the court's below decision constitutes a suspension of the great writ?

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Petitioner, Jack Dowell, prays that this Honorable Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above proceeding on November 13, 2019.

I.
CITATIONS OF OPINIONS AND ORDERS IN CASE
A. COURSE OF PROCEEDINGS IN THE SECTION 2255(e)

The original judgment of conviction of Petitioner in the United States District Court for the District of Colorado was not reported and is attached hereto as **Appendix**

The original judgment of conviction of Petitioner was appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the conviction and sentence in an published cited as ***United States v. Dowell, 430 F.3d 1100 (10th Cir, 2005).***

Mr. Dowell, filed an application for second or successive 28 U.S.C. §2255(h) Motion, which was an "*inadequate or ineffective*" remedy to test the legality of his detention. ***See In re Jack Dowell, 18-1451 (10th Cir. Nov. 20, 2018),*** attached hereto as ***Appendix "2".***

On March 15, 2018, the United States District Court for the District of Colorado filed it's order of dismissal of Mr. Dowell's Application of petition for writ of habeas corpus in an unpublished opinion which is attached hereto as **Appendix "3"**.

On October 22, 2019, the United States Court of Appeals for the Tenth Circuit issued its opinion and order affirming the district court's dismissal is unpublished and is attached hereto as **Appendix "4"**.

On November 13, 2019, The order denying Mr. Dowell's petition for rehearing en banc hearing is unpublished and is attached hereto as ***Appendix "5".***

II.
JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was entered November 13, 2919, denying petition for rehearing en banc The jurisdiction of

this Court is invoked under 28 U.S.C. §1254(1). Petitioner respectfully requests this Court to decide sua sponte if the federal courts have subject matter jurisdiction to entertain this Petition and whether the court's below had subject matter jurisdiction over this case.[1] The Supreme Court precedence is replete with cases demonstrating the actions necessary for the government to acquire subject matter jurisdiction over state lands from ***Bevans, 16 U.S. (3 Wheat.) 336 (1818)*** and its progeny to ***Adams, 87 L. Ed. 1421, 319 U.S. 312-315 (1943),*** to ***Caha v. United States, 152 U.S. at 215,*** where the Supreme Court stated: The laws of Congress in respect to those matters do not extend

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1. Subject matter jurisdiction maybe raised at any time. ***United State v. Cotton, 535 U.S. 625, 630 (2002); Henderson v. Shineski, 131 S.Ct. 1157 (2011)***. "Subject matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court." ***United States v. Cotton, at 630,*** It is clear and uncontested that the government has offered no proof of cession or acceptance of exclusive or concurrent jurisdiction of the land where the alleged crime took place in accordance with the Constitution under ***Art. 1, Sect. 8, Cl. 17 or 40 U.S.C., Sect. 3112***. Unless and until notice and acceptance of jurisdiction to punish under criminal laws of the United States an act committed on lands acquired by the United States, as provided by ***40 U.S.C.S. 3112 (Former 40 U.S.C. 255)***. Unless and until the United States has so filed and published acceptance of jurisdiction it is to be conclusively presumed that no such jurisdiction was been accepted. **(Adams v. United States, 319 U.S. 312 (1943)).** It conclusively presumed that jurisdiction has not been accepted until the government accepts jurisdiction over land as provided in this section ***40 U.S.C. 3112(c),*** federal jurisdiction. This Court has explained that if the court is without jurisdiction then it would not matter if found guilty by a jury 100 times. S***ee, Maxfield's Lessee v. Levy, 4 U.S. 330, 4 Dall 330 (1797).*** Jurisdiction of the land where the alleged crime took place was not retained by the government when Colorado became a state. The land was not purchased by the Government with the consent of the Legislature ceding exclusive or concurrent jurisdiction. No request has been made to the Governor of the State for cession of jurisdiction to be granted to the government, nor has acceptance in writing be made in accordance with ***40 U.S.C. 3112***. Courts, including this Court, have an obligation to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party. ***Albaugh v. Y & H Corp., 163 L. Ed. 2d 1092, 1101 (2006). (citations omitted)***. "Even if not raised by the parties, we cannot ignore the absence of federal jurisdiction. ***Lake County Estates v. Tahoe Planning Agency, 440 U.S. 391, 398 (1979)***, and that we must also notice the possible absence of jurisdiction because we are obligated to do so even when the issue is not raised by a party." ***Izumi Seimisu Kogyo v. U.S. Phillips, 510 U.S. 27, 33 (1993)***.Before considering the questions raised by the Petition for Certiorari, the jurisdiction of the federal court must be determined. ***Treinies v. Sunshine Mining Co., 308 U.S. 66, 70 (1940).***

into the territorial limits of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national Government.

III.
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; . . . and to have the assistance of counsel for his defence."

3. The statute under which Petitioner sought habeas corpus relief was 28 U.S.C. §2241 and §2255(e) which states in pertinent part:

> **§2241. Power to grant writ**
>
> (a) Writ of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c). The writ of habeas corpus shall not extend to a prisoner unless— (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.

Title 28 United States Code, Section 2255(e) provides:

> (e) 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.

IV.
STATEMENT OF THE CASE AND FACTS

A. Course of the proceedings below:

On January 11, 2019, Dowell, filed a petition for writ habeas corpus pursuant to 28 U.S.C. §2241. 2255(e) in the United States District Court for the District of Colorado, Denver Division, challenging the legality of his detention. (Dkt. No. 1-3).

Mr. Dowell argued that in the wake of ***Marinello v. United States, 584 U.S. ___ (2018),*** that in light of ***Marinello*** that his continued detention is illegal as well as his conviction for destroying government property by fire, violating 18 U.S.C §§2, 844(f)(1) & (2) and forcibly interfering with IRS employees and administration, violates 18 U.S.C. §§2, 26 U.S.C. §7212(a). (Doc. 1-2 at 8-10). Mr. Dowell argued that the second or successive provision of 28 U.S.C. §2255(h)(1) & (2), provides an "inadequate and ineffective" remedy (Dkt. No. 1 at 13-14). Mr. Dowell argued that ***Marinello*** is a retroactive Supreme Court decision because it decided a meaning of a criminal statute enacted by Congress. (Dkt. No. 1-2 at 8-13).

On February 7, 2019, the district court issued a show cause order directing the Petitioner to show cause, in writing why Mr. Dowell's writ should not be Dismissed within twenty (20) days of the date of service. (Dkt. No. 3). In compliance with the district court's order Mr. Dowell filed a timely motion showing cause.

On March 15, 2019, the district court issued an order dismissing the petition. On that same date, the Court issued a final judgment denying Mr. Dowell's §2241 habeas petition.

On April 1, 2019, Mr. Dowell filed a notice of appeal and a motion for permission to appeal in forma pauperis. The district court issued an order denying the motion to proceed on appeal through in forma pauperis. Mr. Dowell paid the court cost and appellate filing fees.

This petition follows.

V.
REASONS FOR GRANTING THE WRIT

Mr. Dowell, asserts that the district court denied him due proces of law by applying the ***Prost*** test to deny his habeas petition because in light of ***Marinello, infra,*** he had no opportunity to raise his claim and the criteria of ***Prost,*** *infra, i*s in direct conflict with eight other circuit court of appeals decisions which would have afforded him relief had he been housed in those district's. Mr. Dowell has been deprived of due process in light of the retroactively applicable Supreme Court decision ***Marinello,***

because the district court's jury charge relieve the prosecution of its burden of proof, in violation of the Fifth Amendment of the United States Constitution.

Mr. Dowell asserts that because ***Prost,*** does not authorize applications under the savings clause provision for retroactively applicable Supreme Court decision in ***Marinello*** it amounts to suspension of the great writ in violation of Article Article I, Section 9 Clause 2 of the Constitution.

The district court's failure to comply with this Court's precedence in ***Bousley*** deprived him of due process by denying Mr. Dowell habeas petition without conducting an evidentiary hearing to afford him an opportunity to prove that he is actually innocent on Count Two.

GROUND ONE

Where the district court dismissed Mr. Dowell's 28 U.S.C. §§2241 and 2255(e) habeas petition claiming the savings clause does not apply to Mr. Dowell, in light of the Tenth Circuits precedence in *Prost*, which is in direct conflict with eight opinions other court of appeals decision and this court should exercise it supervisor power and resolve the conflict

STANDARD OF REVIEW

The availability of habeas corpus relief under 28 U.S.C. §2241 savings clause presents a question of law this Court reviews de novo. ***Darby v. Hawk-Sawyer, 405 F.3d 942, 943 (11th Cir. 2005).***

ARGUMENTS AMPLIFYING REASONS FOR WRIT

Mr. Dowell argues that he and other prisoner's housed (confined within the 10th Circuit and the 11th Circuit) are being deprived of liberty without due process of law because these two circuit court of appeals issued rulings that suspended the writ of habeas corpus. See ***McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017),*** and ***Prost v. Anderson, 636 F.3d 578, 597 (2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012).*** The cognizability of a habeas petition by a federal prisoner, is limited by 28 U.S.C. 2255(e). Section 2255(e) instructs that a federal prisoner's habeas petition "shall not be entertained if it appears that" the sentencing court "has denied him relief " on a Section 2255 motion, "unless it also appears that the remedy by motion is "*inadequate or ineffective*" to test the legality of his detention."

Mr. Dowell did not dispute that he had previously been denied relief on a Section 2255 motion. Mr. Dowell argued, and the government did not disagree, that his particular habeas petition was cognizable under the "unless" clause of Section 2255(e), referred to as the "saving clause." Mr. Dowell's conviction is a "fundamental defect" that permitted resorting to the saving's clause where his claim is based on a newly recognized intervening Supreme Court decision in ***Marinello*** which is a retroactive Supreme Court decision because it decided a meaning of a criminal statute enacted by Congress. ***See 26 U.S.C. §7212(a).***

INADEQUATE OR INEFFECTIVE REMEDY

The 28 U.S.C. § 2255(h), remedy turned out to be both *"inadequate or ineffective" to* test the legality of Mr. Dowell's detention for the exact same reasons, which are hereby adopted as if set forth herein verbatim as quoted in ***United States v. Barrett, 178 F.3d 34, 52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 363 (2nd Cir. 1997); In re Dorsainvil, 119 F.3d 245, 248, 251(3rd Cir. 1997); In re Jones, 226 F.3d 328, 334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001);; Martin v. Perez, 319 F.3d 799, 805 (6th Cir.2003); In re Davenportt, 147 F.3d 605, 611 (7th Cir.*** 1998); ***Alaimalo v. United States, 645 F.3d 1042, 1047 (9th Cir. 2011); and In re Smith, 285 F.3d 6, 8 (D.C. Cir. 2002).***

The district court determined, however, that the savings clause did not apply to Mr. Dowell's claim, citing the court of appeals' recent decision in ***Prost v. Anderson, 638 F.3d 578, 584 (10th Cir. 2011),*** The test for determining whether the remedy provided in the sentencing court pursuant to §2255 is inadequate or ineffective is whether Mr. Dowell's claim could have been raised in an initial 2255 motion. ***See Prost, 636 F.3d at 584.*** If the answer is yes, then the petitioner may not resort to the saving clause [§2255(e)] and ***§2241." Id. See Prost, 636 F.3d at 584.*** The Order denying Mr. Dowell's habeas corpus petition stated: Mr. Dowell first contends the remedy available in the sentencing court pursuant to §2255 is inadequate and ineffective because the

United States Court of Appeals for the Tenth Circuit has denied him permission to pursue his ***Marinello*** claim in a second or successive §2255 motion. He also argues that §2255 provides an inadequate and ineffective remedy because his claim was not reasonably available until the Supreme Court decided ***Marinello*** and that decision demonstrates he is actually innocent and is retroactively applicable to cases on collateral review. The Court is not persuaded. "[T]he mere fact that [a prisoner] is precluded from filing a second §2255 petition does not establish that the remedy in §2255 is inadequate." ***Caravalho, 177 F.3d at 1179.*** Furthermore, under ***Prost***, the savings clause in §2255(e) does not extend to second or successive claims that fail to meet the requirements of §2255(h). ***See Prost, 636 F.3d at 585-86.*** Contrary to ***Prost,*** the ***Prost Court,*** had no knowledge of Congressional intent other than what 28 USC §2255(e) states **which does not state:** *"the savings clause in § 2255(e) does not extend to second or successive claims that fail to meet the requirements of § 2255(h).* " ***See Prost, 636 F.3d at 585-86.*** Contrary to ***Prost***, the ***Prost*** Court had no knowledge of Congress intent other that what it states in 28 USC §2255(e). The ***Prost Court,*** relied on sheer speculations and wishful thinking, Finally, "[u]nder the ***Prost*** framework, a showing of actual innocence is irrelevant." ***Abernathy v. Wandes, 713 F.3d 538, 546 n.7 (10th Cir. 2013).*** For these reasons, the Court finds that Mr. Dowell fails to demonstrate the remedy available in the sentencing court pursuant to §2255 is inadequate or ineffective and the application must be dismissed for lack of statutory jurisdiction. ***See Abernathy,***

713 F.3d at 557. Accordingly, it is ORDERED that the action is dismissed for lack of statutory jurisdiction. It is FURTHER ORDERED that leave to proceed in forma pauperis on appeal is denied without prejudice to the filing of a motion seeking leave to proceed in forma pauperis on appeal in the United States Court of Appeals for the Tenth Circuit.

The district court failed to address all the reasons set forth in these cases that the remedy is both inadequate or ineffective to test the legality of Mr. Dowell's detention for the exact same reasons, which are hereby adopted as if set forth herein verbatim as quoted in ***United States v. Barrett, 178 F.3d 34, 52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 363 (2nd Cir. 1997); In re Dorsainvil, 119 F.3d 245, 248, 251(3rd Cir. 1997); In re Jones, 226 F.3d 328, 334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001);; Martin v. Perez, 319 F.3d 799, 805 (6th Cir.2003); In re Davenportt, 147 F.3d 605, 611 (7th Ciur. 1998); Alaimalo v. United States, 645 F,3d 1042, 1047 (9th Cir. 2011);*** and ***In re Smith, 285 F.3d 6, 8 (D.C. Cir. 2002).[2] See Clisby v. Jones, 960 F.2d 925, 935-936 (11th Cir. 1992) (en banc)***(The Court held, under the court's supervisory power, that the district courts in this Circuit must address all claims presented in a habeas petition regardless of whether relief is granted or denied. ***See also Rose v. Lundy, 455 U.S. 509,***

2. This appeal should be heard en banc by the full court to address whether this Court should overturn ***Prost, supra,*** to resolve the conflict among circuit courts on the savings clause. The decision below, in denying habeas relief to Mr. Dowell based on his claim of statutory error, exacerbates a widespread circuit conflict about the availability of such relief under the saving clause of 28 U.S.C. 2255(e).

102 S.Ct. 1198, 1204, 71 L.Ed.2d 379 (1982) ("To the extent that the ['total exhaustion'] requirement reduces piecemeal litigation, both the courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review."); ***Galtieri v. Wainwright, 582 F.2d 348, 356 (5th Cir. 1978) (en banc)***. The ***Clisby*** Court held that "[t]he havoc a district court's failure to address all claims in a habeas petition may wreak in the federal and state court systems compels us to require all district court to address all such claims. Accordingly, this court, from now on, will vacate the district court's judgment without prejudice and remand the case for consideration of all remaining claims whenever the district court has not resolved all such claims." ***Id. at 960 F.2d 938.***

It cements the Fourth Circuit's disagreement with the Eleventh Circuit's en banc decision in ***McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017),*** and the Tenth Circuit's decision in ***Prost v. Anderson, 636 F.3d 578, 597 (2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012),*** both of which recognize that the savings clause does not provide an alternative channel for second or successive collateral attacks that Section 2255(h) would otherwise bar. And it is a novelty even among the circuits that have adopted analogous approaches to the saving clause, none of which has yet extended that approach to authorize the vacatur of a sentence that is within the correct statutory range on the ground that the statutory

minimum was calculated erroneously.

The conflict on the scope of the saving clause has produced, and will continue to produce, divergent outcomes for litigants in different jurisdictions on an issue of great significance. Prior to 1998, the Department of Justice took the view that relief under the saving clause is unavailable for statutory claims. ***See United States v. Wheeler, App. No. 16-6073 (4th Cir. March 28, 2018)(cert denied).*** Following rulings by courts of appeals that "decline[d] to adopt the government's restrictive reading of the habeas preserving provision of § 2255," ***Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997), see In re Davenport, 147 F.3d 605, 608-612 (7th Cir. 1998); In re Dorsainvil, 119 F.3d 245, 248-252 (3d Cir. 1997),*** the Department reconsidered its views, taking the position, including in the district court in this case, that an inmate can seek relief for a statutory based error under Section 2255(e). The Department has since reevaluated that change in position and has determined, in accord with ***Prost*** and ***McCarthan,*** that its original interpretation of Section 2255(e) was correct, and that a contrary reading would be insufficiently faithful to the statute's text and to Congress's evident purpose in limiting the circumstances in which a criminal defendant may file a second or successive petition for collateral review. As this case illustrates, however, the Department's change of position will not cause the conflict in the courts of appeals to resolve itself.

Contrary to the government's position, Congress in 1996 drafting the ADPA did not change or re-write the Savings Clause provision of Section 2255(e), rather Congress

left the Savings Clause provision in tact to allow prisoner's like Mr. Dowell to litigate claims that doesn't meet the standards of 2255(h). See ***Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997), see In re Davenport, 147 F.3d 605, 608-612 (7th Cir. 1998); In re Dorsainvil, 119 F.3d 245, 248-252 (3d Cir. 1997).***

The ***Prost,*** decision was and is an incorrect application of the law and this Court should overturn ***Prost,*** following the rulings by eight other circuit courts of appeals that "decline[d] to adopt the government's restrictive reading of the habeas preserving provision of § 2255(e)," ***Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997), In re Davenport, 147 F.3d 605, 608-612 (7th Cir. 1998); In re Dorsainvil, 119 F.3d 245, 248-252 (3d Cir. 1997).*** These rulings guarantee the writ of habeas corpus; while the ***Prost, supra, decision violates the United States Constitution Article I, Section 9 Clause 2 by suspending the writ;*** ***("****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.****"); United States v. Hayman, 342 U.S. 205,223, 72 S.Ct. 263, 96 L.Ed. 232 (1952).***

In re Jones, 226 F.3d 328 (4th Cir. 2000), had allowed a "narrow gateway" to habeas relief for certain federal prisoners who claimed that the limits on second or successive Section 2255 motions rendered a Section 2255 motion "inadequate or ineffective to test the legality of a conviction."

In particular, ***Jones*** had countenanced habeas relief for a prisoner whose

conviction was valid under precedent that was controlling at the time of direct review and a first Section 2255 motion, if (1) new superseding precedent established that his conduct was not a crime and (2) that new precedent rested on non-constitutional grounds that Section 2255(h) would not recognize as a proper basis for a further collateral attack. ***See ibid.; see also Jones, 226 F.3d at 333-334.***

The court of appeals granted rehearing en banc in ***Surratt*** and ultimately dismissed the case as moot after the President commuted ***Surratt's*** sentence. ***United States v. Surratt, 855 F.3d 218, 219 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 554 (2017).*** In its subsequent decision in respondent's own appeal, the court departed from the vacated decision ***Surratt***. It held that respondent, whose statutory claim was barred by Section 2255(h)'s limitation on second-or-successive Section 2255 motions, could nevertheless rely on Section 2255(e)'s saving clause to raise it in a habeas petition. App., infra, 1a-34a.

At the outset, the court of appeals in ***Surratt,*** noted that the government no longer agreed, as it had in the district court, that the saving clause permitted respondent's claim. App., infra, 9a-10a. The government's brief on appeal informed the court that the Solicitor General had reconsidered the government's position on the scope of the clause and had returned to the position that the government had taken before 1998, rather than the one advanced in the district court in this case. Under that original position—which accords with the Tenth Circuit's decision in ***Prost v. Anderson, 636 F.***

3d 578, 597 (2011) (Gorsuch, J.), cert. denied, 565 U.S. 1111 (2012), and the Eleventh Circuit's en banc decision in ***McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, cert. denied, 138 S. Ct. 502 (2017)***—the saving clause does not authorize habeas petitions based on statutory claims that Section 2255(h) would otherwise preclude. App., infra, 10a; see Gov't C.A. Br. 25-53.

Although the government in ***Surratt*** recognized that the panel lacked the authority to overrule the circuit's prior interpretation of the savings clause in ***Jones***, it asked the panel not to extend Jones to respondent's claim, which asserted an error only as to the applicable statutory minimum sentence. See Gov't C.A. Br. 53-61. The court of appeals declined to view the government's defense of the district court's judgment as waived, on the ground that "the savings clause requirements are jurisdictional" and thus not waivable. App., infra, 16a; see id. at 10a-18a. The court identified "many reasons," including the language of Section 2255(e) and its similarity to other provisions that this Court "has deemed jurisdictional," id. at 14a, 15a, for construing the provision to be jurisdictional in nature. See id. at 10a-18a.

The court of appeals in ***Surratt*** concluded, however, that its prior approach in Jones, which concerned a non constitutional challenge to a conviction, should also apply to a non-constitutional challenge to a statutory minimum. App., infra, 19a-24a. The court adopted the view that Section 2255 is inadequate or ineffective to test the legality of a prisoner's sentence when: (1) at the time of sentencing, settled law of the circuit or

the Supreme Court established the legality of the sentence; (2) after the prisoner's direct appeal and first Section 2255 motion, the law was changed by a decision of statutory interpretation, which was deemed to apply retroactively on collateral review; (3) the prisoner is unable to satisfy the gatekeeping provisions of Section 2255(h)(2) for second or successive motions; and (4) due to the retroactive change in law, the sentence now presents an error sufficiently grave to be deemed a fundamental defect. Id. at 23a-24a.

The court of appeals further concluded that respondent's habeas petition was cognizable under that test. App., infra, 24a-32a. The court of appeals in ***Surratt*** then reasoned, with respect to the fourth requirement, that an erroneous statutory minimum sentence It observed, with respect to the first three requirements, that (1) at the time of sentencing, the district court's calculation of a higher statutory minimum based on respondent's prior North Carolina conviction was correct under controlling circuit precedent; (2) the contrary en banc Simmons decision was issued and made retroactive after respondent's direct appeal and Section 2255 motion; and (3) Section 2255(h)'s limitation on second or successive Section 2255 motions would bar respondent from seeking relief based on the non-constitutional holding in ***Simmons***. Id. at 24a-25a. sentence was "sufficiently grave to be deemed a fundamental defect." Id. at 32a. The court rejected the government's argument that no fundamental defect had occurred because respondent could lawfully have received the same sentence for his drug conspiracy (10 years of imprisonment) without an enhancement based on his prior North

Carolina conviction. Id. at 29a-32a.

The court of appeals in ***Surratt*** subsequently denied the government's petition for rehearing en banc, which had expressly requested that the court overrule Jones. App., infra, 55a; see Pet. for Reh'g 13-14. In a statement respecting denial of the petition, Judge Agee expressed his disagreement with the panel decision and his hope that this Court will "hear this case in a timely fashion to resolve the conflict separating the circuit courts of appeal nationwide on the proper scope of the § 2255(e) saving clause so that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law." App., infra, 58a; see id. at 56a-58a. Judge Thacker also filed a statement that acknowledged the circuit conflict but argued that the panel decision was correct. Id. at 59a-62a.

The government in ***Surratt,*** moved to stay the mandate pending the filing and disposition of a potential petition for certiorari, but the court of appeals denied the motion.

Mr. Dowell, presented a Fifth Amendment Due Process claim based upon a retroactively applicable Supreme Court decision ***Marinello*** which shows that the district court's jury charge in Mr. Dowell's case relieved the prosecution of its burden of proof and overturned Tenth Circuit precedent. See ***Marinello v. United States, 584 U.S. ___ (2018).***

Under the discrete circumstances and facts of Mr. Dowell's case, the savings

clause is applicable. ***See Goldman v. Winn, 565 F.Supp.2d 200, 213 (D. Mass. 2008). Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 171 (2nd Cir. 2000); United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999); Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002).***

The Circuits that have determined that the actual innocence exception may be extended to noncapital sentencing cases reasoning that the Supreme Court stated that the purpose of the rule is grounded in equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. See ***Haley,306 F.3d at 265 (quoting Herrera v. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 122L.Ed.2d 203 (1992))***. It appears, that Eleventh Circuit has not addressed this issue. However, Judge Lazzara in the Middle District in ***George v. United States, 2009 U.S. Dist. LEXIS 44788 (M.D. Fla. 2009),*** held that the actual innocence exception applies to noncapital sentencing cases. ***But see, Abernathy v. Wandes, 713 F.3d 538, 546 n.7 (10th Cir. 2013).*** "[u]nder the Prost framework, a showing of actual innocence is irrelevant." ***This creates another conflict among circuit courts.***

Mr. Dowell proved that Section 2255(h) provided an "Ineffective and Inadequate remedy" to challenge the legality of his detention based upon a retroactively applicable Supreme Court decision based on the substantive reach of a federal criminal statute. ***See Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 901-903 fn. 19, 20-29 (5th Cir. 2001); In re Jones, 226 F.3d 328, 333-34***

(4th Cir. 2000); Wofford, 177 F.3d at1244.

In ***Triestman v. United States, 124 F.3d 361, 377 (2nd Cir. 1997)***, the Court devised its savings clause test based on whether failure to permit a remedy would "raise serious constitutional questions." ***Triestman*, 124 F.3d at 377**. Whenever a judge believes "justice would seem to demand a forum for the prisoner's claim in so pressing a fashion as to cast doubt on the constitutionality of the law that would bar the §2255 petition," the prisoner would be permitted access to habeas corpus writs. See id. @ **378**. Mr. Dowell's case raises serious constitutional questions which should open the §2241 savings clause for relief. *See* ***Triestman*** and ***Goldman,*** *both supra.*

Failure to grant relief in Mr. Dowell's case results in the suspension of the writ, in violation of the United States Constitution Article I, Section 9 Clause 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."); ***United States v. Hayman, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952).***

The aforementioned facts, arguments and authorities stand for the proposition that ***Prost, supra,*** is an incorrect application of the savings clause and should be overturned.

GROUND TWO

Was Mr. Dowell denied due process where the jury instructions relieved the prosecution of its burden of proof in light of *Marinello* rendering his conviction unconstitutional and revealing that Mr. Dowell is actually innocent and does *Marinello* apply retroactively to cases on collateral review and did the court's

below decision constitute a suspension of the great writ?

STANDARD OF REVIEW

The availability of habeas corpus relief under 28 U.S.C. §2241 savings clause presents a question of law this Court reviews de novo. ***Darby v. Hawk-Sawyer, 405 F.3d 942, 943 (11th Cir. 2005)***.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

Mr. Dowell argues that the conviction on count two is unconstitutional in light of the Supreme Court decision in ***Marinello v. United States, 584 U.S. _____ (2018),*** which held that prosecutors must establish a "nexus" between a particular administrative proceeding and a taxpayer's conduct in order to obtain a conviction under the "Omnibus Clause," in ***26 U.S.C. §7212(a)*** of the Internal Revenue Code. The statute forbids "corruptly or by force or threats of force...obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [the Internal Revenue Code].

A. FACTS OF MARINELLO V. UNITED STATES.

Carlo J. Marinello, II, owned and operated a freight service business in western New York that couriered items between the United states and Canada. Between 2004 and 2009, the Internal Revenue Service (IRS) intermittently investigated Marinello's tax activities. In 2012, the Government indicted Marinello for violating, among other criminal tax statutes, ***26 U.S.C. 7212(a).***

B. JURY INSTRUCTIONS IN MARINELLO'S CASE.

Before the jury retired to consider the charges, the judge instructed it that, to convict ***Marinello*** of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so "corruptly," meaning "with the intent to secure an unlawful advantage or benefit, either for [himself] or for another." App. in No. 15–2224 (CA2), p. 432. The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted ***Marinello*** on all counts. ***Marinello*** subsequently appealed.

The Second Circuit Court of Appeals affirmed, rejecting, ***Marinello's*** claim that an Omnibus Clause violation requires the Government to show the ***§7212(a)*** defendant tried to interfere with a pending IRS proceeding, such as a particular investigation. In reaching its decision, the panel dismissed the Sixth Circuit's concern that broadly interpreting ***26 U.S.C §7212(a)*** could subject a defendant to felony charges for "conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed." The Supreme Court agreed to resolve the circuit split.

C. The Supreme Court Majority Decision in Marinello v. United States.

The ***Marinello*** Court reversed by a vote of 7-2. "To convict a defendant under the Omnibus Clause, the Government must prove the defendant was aware of a pending tax-

related proceedings, such as a particular investigation or audit, or could reasonably foresee that such a proceeding would commence," Justice Stephens Breyer wrote on behalf of the majority:

> "We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceeding." *Aguilar*, 515 U. S., at 599 (citing *Wood*, 6 F. 3d, at 696). By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their "continuous, ubiquitous, and universally known" administration of the Tax Code.... Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge."
>
> In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. **See *Arthur Andersen*, 544 U. S., at 703, 707–708** (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their "use in an official proceeding"). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing. **Id.**

D. JURY INSTRUCTION IN MR. DOWELL'S CASE.

The district court instructed the jury as follows:

> The defendant is charged in Count 2 of the indictment with knowingly and unlawfully by force endeavoring to intimidate or impede any officer employee of the United States acting in an official capacity, and obstructing or impeding the due administration of the Internal Revenue laws, or aiding and abetting this offense, in violation of Title 26 United States Code Section 7212(a) and 18, United States Code, Section 2.
>
> Now, this section 7212(a) of title 26 provides in pertinent part, "whoever, by force or threats of force, endeavors to intimate or impede any officer or employee of the United States acting in an Official capacity under this title, or in any other way by force or threats of force, obstructs or impedes or endeavors to obstruct or impede the due administration of the internal Revenue code, is in violation of a federal statute.
>
> To sustain the charge of endeavoring to obstruct or impede the administration of the Internal Revenue laws by force, the government must prove the following elements beyond a reasonable doubt. First, the defendant endeavored to obstruct or impede the due [administration] of the Internal Revenue laws by the use of force. Second, that

> defendant did so knowingly and intentionally.
>
> The phrase due administration of the Internal Revenue laws includes the Internal revenue Services of the Department of Treasury carrying out its lawfully functions in the ascertaining of income taxes, the auditing of tax returns records, and the investigation or possible criminal violation of Internal Revenue laws, such as the filing of false or fraudulent income tax returns.
>
> The term endeavor describes any effort or act to obstruct or impede the due administration of the Internal Revenue laws. The endeavor need not be successful, but it must at least have had a reasonable tendency to obstruct or impede the due administration of the Internal Revenue laws.

The jury instruction in Mr. Dowell case relieved the prosecution of its burden of proof in light of the ***Marinello*** decision and deprived Mr. Dowell of due process of law. ***See, e.g., Medley v. Runnels, 506 F.3d 857,863-868 (9th Cir. 2007)***(The trial court's jury instructions relieved the prosecution of its burden of proof that a flare gun was designed to be used as a weapon as defined by statute and violated due process warranting habeas relief).

Marinello Applies Retroactively on Collateral Review

Mr. Dowell argues that ***Marinello*** is distinguished from ***In re Swingeing, No. 15-1799, 2015 WL6158150, @*3 (10th Cir. 2015),*** which held that ***Johnson v. United States***, did not apply retroactively. ***Marinello*** is distinguished for the reasons set-forth in ***Bousley*** and ***Tyler.***

In ***Bousley v. United States, 523 U.S. 614, 62 (1998),*** the Supreme Court held that rules made in "situations in which this Court decides the meaning of a criminal statute enacted by Congress" by holding that a substantive federal criminal statute does not reach certain conduct" raise no ***Teague*** retroactivity bar.

Bousley, 523 U.S. at 620. The Supreme Court reiterated that holding in ***Summerlin***, describing the type of ***Bousley*** decisions that "apply retroactively" to include "decisions that narrow the scope of a criminal statute by interpreting its terms because [those decisions] necessary carry a significant risk that a defendant' faces a punishment that the law cannot impose upon him."

In ***Marinello***, the Supreme Court "narrow[ed] the scope of a criminal statute by interpreting its terms. ***Summerlin, 542 U.S. at 351 (citing Bousley, 523 U.S. at 620-21);*** Because the action the Supreme Court took in Marinello is "coexistentive with" ***Bousley*** category of substantive, retroactive rules, the two cases, taken together, "logically dicatate" the conclusion that ***Marinello*** is retroactive. ***Tyler, 533 U.S. AT 666-67.*** Moreover, the ***Marinello*** decision is precisely the kind of rule that "'necessarily carr[ies] a significant risk that a defendant' faces a punishment that the law cannot impose upon him." ***Summmerlin, 542 U.S. at 352 (quoting Bousley, 5523 U.S. At 620).***

Marinello fits neatly within Justice O'Connor's example in ***Tyler.*** "If we hold Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of a particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. ***Tyler, 533 U.S. @ 668-69 (O'Connor, J. concurring)(emphasis added).*** In such circumstance, we can be said to have been 'made' the given rule

retroactive to cases on collateral review." Id. at 669.

Justice Stephen Breyer wrote on behalf of the majority,

> We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a "nexus" between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a "relationship in time, causation, or logic with the [administrative] proceeding." ***Aguilar, 515 U. S., at 599 (citing Wood, 6 F. 3d, at 696).*** By "particular administrative proceeding" we do not mean every act carried out by IRS employees in the course of their "continuous, ubiquitous, and universally known" administration of the Tax Code.... Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.
>
> In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. ***See Arthur Andersen, 544 U. S., at 703, 707–708*** (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their "use in an official proceeding"). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing. ***Id.***

The aforementioned arguments and authorities shows that the Tenth Circuit has misapplied the law in ***Prost***, supra, and this Court should grant certiorari and resolve the conflict amoung the Circuit Court of Appeals. Justice requires nothing less.

GROUND THREE

Whether the district court's failure to comply with this Court's precedence in *Bousely* by denying Mr. Dowell's habeas corpus petition without conducting an evidentiary hearing to afford Mr. Dowell an opportunity to prove he is actually innocent of Count Two constitutes a violation of due process?

STANDARD OF REVIEW

This Court reviews issues of law related to the denial of a habeas relief under §2241 de novo. ***Royal v. Tombone, 141 F.3d 596, 599 (5th Cir. 1998)***. This Court

reviews the district court decision not to conduct an evidentiary hearing for abuse of discretion. ***United States v. Massey, 89 F.3d 1433, 1443 (11th Cir. 1996)***. This Court also reviews pro se brief liberally. ***Johnson v. Quarterman, 479 F.3d 358, 359 (5th Cir. 2007)***.

ARGUMENTS AMPLIFYING REASONS FOR WRIT

The district court failed to comply with the Supreme Court precedence in ***Bousley v. United States, 523 U.S. 614, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998)***, which found that the accused will be entitled to a hearing on the merits of his claim contesting the validity of his conviction to permit him to attempt to make a showing of actual innocence to relieve his procedural default. ***See Jones v. United States, 153 F.3d 1305 (11th Cir. 1998).***

In ***Jones***, the defendant pleaded guilty to using and carrying a firearm during and in relation to a drug trafficking offense. Jones filed a 28 U.S.C. §2255 motion contending that the evidence did not support the conviction and that his plea was not voluntary after the Supreme Court's ruling in ***Bailey*** the district court denied the §2255 motion without conducting an evidentiary hearing. Jones appealed claiming that the Supreme Court's decision in ***Bousley, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)***, required the case to be remanded for hearing to determine whether Jones is actually innocent of the **18 U.S.C. §924(c)(1)**, charge and therefore can establish cause for procedural bar. The Eleventh Circuit remanded for a hearing. *See* ***Jones, 153 F.3d at 1305.***

Mr. Dowell maintains that the exact same scenario of law applies to his case and that this Court should vacate and remand for a hearing. See ***Jones*** and ***Bousley*, supra.**

PRAYER FOR RELIEVE

WHEREFORE, based on the above foregoing facts, arguments and authorities, Mr. Dowell prays that this Honorable Court **REVERSES** the judgment below and remands with instructions to entertain the merits of his petition for writ of habeas corpus.

Respectfully submitted on this 17th **day of** January **20**~~19~~**20.**

Jack Dowell

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PROOF OF SERVICE

I HEREBY CERTIFY that on this 17th day of January 20~~19~~20, a true and correct copy of this foregoing instrument has been deposited mailed through internal Legal Mail at FCI Englewood Mailroom, with first class postage affixed thereto addressed to the Attorney for Re spondent, United States, Office of the Solicitor General, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001. The undersigned hereby executed this certificate under penalty of perjury pursuant to 28 U.S.C. §1746.

Jack Dowell

JACK DOWELL