

NOT RECOMMENDED FOR PUBLICATION

No. 20-5481

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 17, 2020
DEBORAH S. HUNT, Clerk

ANDREW INDELICATO PETERSON,

Petitioner-Appellant,

V.

S. BUTLER, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
KENTUCKY

ORDER

Before: GUY, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Andrew Indelicato Peterson, a pro se federal prisoner at the Federal Correctional Institution—Manchester, in Manchester, Kentucky, appeals the district court’s judgment denying his 28 U.S.C. § 2241 petition for a writ of habeas corpus. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2016, Peterson pleaded guilty to being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1), and the United States District Court for the District of Minnesota sentenced him to 120 months of imprisonment. The Eighth Circuit Court of Appeals affirmed his sentence. *United States v. Peterson*, 869 F.3d 620, 621 (8th Cir. 2017). And Peterson filed an unsuccessful motion to vacate under 28 U.S.C. § 2255. See *United States v. Peterson*, No. 15-CR-0106(2) (PJS/FLN), 2018 WL 1936008 (D. Minn. Apr. 24, 2018).

In 2020, Peterson filed a § 2241 petition in the Eastern District of Kentucky, his district of confinement, *see Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004), asserting that his § 922(g) felon-

in-possession conviction is invalid under *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* held that § 922(g) requires the government to prove “that the defendant knew he possessed [ammunition] and also that he knew he had the relevant status when he possessed it.” *Id.* at 2194. Peterson also asserted that the ammunition that he was charged with illegally possessing was destroyed in a fire at the police station’s evidence room, which prevented the government from establishing—and him from challenging—§ 922(g)(1)’s jurisdictional element that the ammunition traveled in interstate commerce. The district court denied Peterson’s petition as “an impermissible collateral attack on his underlying conviction.” The court also denied Peterson’s motion to amend or correct that decision. Peterson now appeals.

We review de novo a district court’s judgment denying a § 2241 petition. *Wooten v. Cauley*, 677 F.3d 303, 306 (6th Cir. 2012). “A federal prisoner must challenge the legality of his detention by motion under 28 U.S.C. § 2255, but may challenge the manner or execution of his sentence under 28 U.S.C. § 2241.” *Id.* “Still, pursuant to the ‘savings clause’ in § 2255[(e)], a federal prisoner may bring a claim challenging his conviction or imposition of sentence under § 2241, if it appears that the remedy afforded under § 2255 is ‘inadequate or ineffective to test the legality of his detention.’” *Charles v. Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam) (quoting § 2255(e)). And we have explained that the § 2255 remedy is “inadequate or ineffective” where a petitioner who claims actual innocence shows “that he had no prior reasonable opportunity to bring his argument for relief.” *Wright v. Spaulding*, 939 F.3d 695, 705 (6th Cir. 2019); *see also Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016). To do so, the petitioner must identify “a Supreme Court decision that adopts a new interpretation of a statute after the completion of the [petitioner’s] initial § 2255 proceedings.” *Hueso v. Barnhart*, 948 F.3d 324, 333 (6th Cir. 2020). And the petitioner must “allege and prove” actual innocence by showing that the new case “applies to the merits of the petition to make it more likely than not that no reasonable juror would have convicted him,” *Wooten*, 677 F.3d at 307-08.

The district court assumed that § 2255 is inadequate or ineffective to test Peterson’s *Rehaif* claim, but the court denied his petition because he did not show that he is actually innocent of his

§ 922(g) conviction. Section 922(g)(1) prohibits the possession of ammunition by a felon, that is, anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." The district court noted that, before his guilty plea to the § 922(g) charge, Peterson had been convicted of three felonies in Minnesota. "This extensive and undisputed criminal history," the district court held, "completely undercuts the implication that Peterson somehow did not know that he was a felon at the time he possessed the ammunition in question." Thus, the district court held that Peterson could not show that it was more likely than not that no reasonable juror would have convicted him of being a felon in possession of ammunition under Rehaif.

Peterson moved to amend or correct the district court's decision. He first argued that the district court erred in not resolving his § 922 jurisdictional arguments, but the district court held that those arguments were not cognizable under § 2241. Peterson also asserted that the district court's description of his criminal history was incorrect. He claimed that one of his three prior convictions involved acts that took place after he committed the § 922(g) offense here and thus that it could not establish that he knew then that he was a felon at the time. But the district court noted that the record still showed that he had pleaded guilty to two other felonies—receiving stolen property and aggravated robbery—years before he possessed the ammunition.

Peterson argues that he is actually innocent of his § 922(g) conviction following Rehaif because he did not know when he possessed ammunition that he was a felon. He first asserts that his receiving-stolen-property conviction was a misdemeanor. But his presentence report shows that it was a felony. He also claims that, although his aggravated-robbery conviction is a felony, he did not know that because his sentence was stayed with an order to serve one year in a workhouse facility and he was discharged in eight months. Yet Peterson's presentence report shows that the stay was revoked and that he was ordered to serve his original 48-month prison term. Given this history, Peterson did not establish his actual innocence after Rehaif. See, e.g.,

United States v. Ward, 957 F.3d 691, 695 (6th Cir. 2020). Peterson also argues that the district court shifted the burden on the knowledge-of-status element from Rehaif. But in a § 2241 petition,

which set
in Cullen v.
18 months of
years Total
In 2013
2014
2015
2016
2017
2018

"[i]t is the petitioner's burden to establish that his remedy under § 2255 is inadequate or ineffective," *Charles*, 180 F.3d at 756, by showing, among other things, that he is actually innocent.

Finally, Peterson argues that the district court erred by not reviewing his jurisdictional claims about the destruction of evidence. Yet the district court determined that those claims were not cognizable under § 2241. Because those claims do not rely on a new interpretation of a statute, and because Peterson could have brought them in his § 2255 motion, *see Wright*, 939 F.3d at 705, the district court did not err in rejecting his jurisdictional claims as non-cognizable.

In sum, assuming that Peterson had no prior reasonable opportunity to raise his *Rehaif* claim, he has not established that it is more likely than not that no reasonable juror would have convicted him of being a felon in possession of ammunition in violation of § 922(g)(1).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT



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O R D E R

BEFORE: GUY, KETHLEDGE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk