No. 20-___

IN THE

Supreme Court of the United States

MICHAEL JACKSON,

Petitioner,

v.

DON HUDSON, WARDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A person in federal custody may challenge the legality of his detention by filing a post-conviction motion under 28 U.S.C. § 2255. Second or successive motions under that statute are typically prohibited. However, Section 2255(e) includes a saving clause that allows a prisoner to petition for a writ of habeas corpus under 28 U.S.C. § 2241 if the Section 2255 remedy is "inadequate or ineffective to test the legality of his detention."

The question presented is:

Whether Section 2255 is "inadequate or ineffective" when, at the time of petitioner's initial Section 2255 motion, circuit precedent foreclosed a potential claim, but that precedent has since been overruled by this Court.

RELATED PROCEEDINGS

Proceedings directly on review:

Jackson v. Hudson, No. 20-3053 (10th Cir. Aug. 4, 2020)

Jackson v. Hudson, No. 20-3055-JWL (D. Kan. Feb. 21, 2020)

Other related proceedings:

United States v. Jackson, No. 4:02-cr-00094-SRB (W.D. Mo. Mar. 6, 2003)

United States v. Jackson, No. 03-1638, 03-1723 (8th Cir. Apr. 26, 2004)

Jackson v. United States, No. 04-5589 (U.S. Jan. 24, 2005; Feb. 25, 2005)

Jackson v. United States, No. 05-0261-CV-W-P (W.D. Mo. Sept. 15, 2005)

United States v. Jackson, No. 03-1638 (8th Cir. Feb. 3, 2006)

Jackson v. United States, No. 06-1604 (8th Cir. June 14, 2006)

Jackson v. United States, No. 06-7350 (U.S. Nov. 27, 2006)

United States v. Jackson, No. 14-2136 (8th Cir. June 24, 2014)

Jackson v. United States, No. 15- 3472 (8th Cir. May 3, 2016)

Jackson v. United States, Crim. No. 02-00094-01-CR-W-DW; Civil No. 16-CV-00557-W-DW (W.D. Mo. Aug. 31, 2016)

Jackson v. United States, No. 17-1037 (8th Cir. June 12, 2018)

Jackson v. United States, No. 18-6096 (U.S. Feb. 19, 2019)

Jackson v. United States, No. 19-2617 (8th Cir. Oct. 18, 2019)

Jackson v. United States, No. 19-3567 (8th Cir. Mar. 17, 2020)

Jackson v. United States, No. 20-2246 (8th Cir. Aug. 18, 2020)

Jackson v. Warden, No. 20-3292-JWL (D. Kan. Nov. 30, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Jackson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a-7a) is reported at 822 Fed. Appx. 821. The order of the district court (Pet. App. 8a-11a) dismissing petitioner's Section 2241 petition for habeas corpus is not reported but is available at 2020 WL 869404.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2020. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2255(e) provides:

> 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.

28 U.S.C. § 2255(h) provides:

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.

28 U.S.C. § 2241(a) provides:

Writs 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.

INTRODUCTION

This petition presents the Court a long-awaited opportunity to resolve a deeply entrenched and consequential circuit conflict over whether a federal prisoner is entitled to challenge his conviction when he was precluded from raising a claim of innocence in his initial Section 2255 petition by then-binding circuit precedent that was subsequently overruled by this Court.

The Government has previously conceded that the question presented divides the circuits and warrants this Court's review. Indeed, two years ago the Government itself filed a petition raising the question (albeit in a case that became a poor vehicle while the petition was pending). Numerous courts and judges, including now-Justice Barrett, have likewise bemoaned the lack of clarity in this area, and some, including Judges Thapar of the Sixth Circuit and Agee of the Fourth, have openly called upon the Court to resolve the conflict.

For a time, the Government also agreed with petitioner's position on the merits, arguing to this Court and others that inmates who were prevented by erroneous circuit precedent from bringing what is now a meritorious challenge to their conviction should be entitled to file a new habeas petition to contest their conviction once that circuit precedent has changed.

But after switching positions and telling the Court in its own petition that the circuit conflict is intolerable, the Government has since successfully opposed a number of petitions raising various versions of the same question, frequently suggesting that the denial of its petition indicates that the Court is not

interested in resolving the split and arguing that the particular petition presents a poor vehicle anyway. The first claim is implausible: the circuit conflict is intolerable, allowing recourse for some whose convictions have been rendered illegal by this Court's precedents while leaving others wrongfully imprisoned. The second objection does not arise in this case, which presents the Court an appropriate vehicle for resolving the question. The petition should be granted.

STATEMENT OF THE CASE

1. In March 2002, petitioner Michael Jackson and his brother Fabian were arrested after allegedly burglarizing a house and taking, among other things, the homeowner's rifle. *United States v. Jackson*, 365 F.3d 649, 651-52 (8th Cir. 2004), *vacated*, 543 U.S. 1103 (2005). They were each charged with being a felon-in-possession in a single-count superseding indictment. As relevant here, the indictment alleged:

> On or about March 1, 2002, in the Western District of Missouri, the defendants, MICHAEL JACKSON, and FABIAN JACKSON, each having been convicted of a crime punishable by imprisonment for a term exceeding one year, and each having been convicted of three violent felonies as defined in 18 U.S.C. § 924(e), committed on occasions different from one another, did knowingly possess in and affecting commerce a firearm, to wit, a Winchester, Model 70, 30-06 caliber rifle, Serial Number 738863, which had been transported in interstate commerce.

> All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

Pet. App. 12a-13a.

Accordingly, the indictment charged that petitioner *had* prior convictions punishable by a year or more imprisonment; but it did not charge that he *knew* his prior convictions were of that description. That is not surprising because at the time of his trial, the law in the Eighth Circuit (and everywhere else) required only proof that a defendant knew he possessed the firearm. *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999). As discussed below, this Court would subsequently overrule that precedent and require the Government to prove "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019).

At trial, consistent with circuit precedent at the time, petitioner stipulated to the fact of his prior convictions, but he did not stipulate to his knowledge regarding whether those convictions were felonies. Tr. on Appeal Vol. 1, at 55-56, No. 4:02-cr-00094-BCW (W.D. Mo. Mar. 31, 2003), Doc. 118. Nor did the Government present any evidence of that knowledge.

Moreover, like the indictment, the jury instructions required the Government to prove only that petitioner "knowingly possessed a firearm," without requiring the jury to find anything about

petitioner's knowledge of his status. Pet. App. 16a-17a.[1]

On the basis of these instructions, petitioner was found guilty and sentenced to 327 months' imprisonment. Pet. App. 2a.

2. Petitioner appealed to the Eighth Circuit, which affirmed his conviction and sentence. Pet. App. 2a. This Court later vacated and remanded for

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[1] INSTRUCTION NO. 17

The crime of being a felon in possession of a firearm, as charged in Count One of the Indictment, has three essential elements, which are:

COUNT ONE

One, Before March 1, 2002, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year;

Two, On or about March 1, 2002, the defendant knowingly possessed a firearm, that is, a Winchester, Model 70, 30-06 caliber rifle, Serial Number 738863; and,

Three, At some point prior to the defendant's possession of the firearm, it was transported across a state line.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than Missouri and that the defendant possessed the firearm in the State of Missouri then you may, but are not required to, find that it was transported across a state line.

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosion.

For you to find a defendant guilty of the crime charged, the government must prove all of these elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

Pet. App. 16a-17a.

reconsideration in light of *United States v. Booker*, 543 U.S. 220 (2005), but the Eighth Circuit reinstated its judgment. Pet. App. 2a. Petitioner then filed an unsuccessful Section 2255 motion and was later denied authorization to file a second motion under that section. *Ibid.*

3. Subsequently, this Court decided *Rehaif v. United States*, holding that to convict a defendant under 18 U.S.C. § 922(g), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200. *Rehaif* "overturn[ed] the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that ha[d] been adopted by every single Court of Appeals to address the question." 139 S. Ct. at 2201 (Alito, J., dissenting). The Eighth and Tenth Circuits were among those whose decisions *Rehaif* overturned.[2] *See* U.S. BIO at 6, *Rehaif*, *supra* (listing cases).

4. Subsequently, petitioner filed the 28 U.S.C. § 2241 petition at issue here, challenging the validity of his conviction under *Rehaif*. Pet. App. 3a.

Ordinarily, second or successive motions under Section 2255 are barred absent an applicable exception. *See* 28 U.S.C. § 2255(h). But Congress included a saving clause in Section 2255(e), which provides that:

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[2] Petitioner was convicted in the Eighth Circuit but is currently confined in the Tenth Circuit. As such, the petition at issue here was filed in the District of Kansas. *See* Pet. App. 8a.

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

Id. § 2255(e). Petitioner argued that his claim could proceed through this saving clause because "*Rehaif* 'was a substantial change in the law' that renders him innocent of his felon-in-possession offense." Pet. App. 3a (citation omitted).

The district court rejected this argument, Pet. App. 11a, and petitioner appealed.

5. The Tenth Circuit affirmed, relying on its decision *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011). Pet. App. 6a. In *Prost*, then-Judge Gorsuch, writing the majority decision for a divided panel, rejected the majority circuit position that saving clause petitions are permitted when circuit precedent previously foreclosed a claim. The majority held instead that "the possibility of an erroneous result—the denial of relief that should have been granted—does not render the procedural mechanism Congress provided for bringing that claim . . . an inadequate or ineffective *remedial vehicle* for *testing* its merits within the plain meaning of the savings clause." 636 F.3d at 590. This is so even where circuit precedent "requires judges to reject a claim on its merits," leaving only the hope of en banc or certiorari review available. *Id.* at 590-91.

Judge Seymour, concurring in part and dissenting in part, disagreed. First, Judge Seymour noted that "any implication by the majority that it is not creating a circuit split is flatly wrong." 636 F.3d at 599 (Seymour, J., concurring in part and dissenting in part) (internal citation omitted).[3] This was so because "[e]very other circuit deciding the issue has held, contrary to the majority, that § 2255 is 'inadequate or ineffective' as a remedy in the extremely narrow situation in which it would procedurally bar a claim of actual factual innocence, like the one raised here by Mr. Prost, *and* where success on the actual innocence claim was previously barred by circuit precedent." *Ibid.* Judge Seymour went on to disagree with the court's rejection of the circuit-foreclosure test because "[t]he notion that an actually innocent prisoner can adequately and effectively 'test' the legality of his conviction when he has no legal basis in his circuit for doing so cannot be squared with this central purpose of habeas review or the plain language of the savings clause." *Id.* at 606.

In this case, the Tenth Circuit applied *Prost* and its progeny to conclude that "the fact that *after* Mr.

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[3] The *Prost* majority maintained that it was not creating a circuit split because the circuits were already divided over the precise test for allowing saving clause petitions. *Prost*, 636 F.3d at 594. But the Tenth Circuit has recognized that its position conflicts with the majority view in the circuits. *See, e.g.*, *Garcia v. Stancil*, 808 Fed. Appx. 666, 669 (10th Cir. 2020) ("We recognize, as did the magistrate judge, that nine other circuit courts apply the same test as the Third Circuit. But our test, along with that of the Eleventh Circuit, differs.") (citations omitted); *Dowell v. Hudgins*, 793 Fed. Appx. 671, 674 (10th Cir. 2019) ("the circuit courts are split"), *cert. denied*, 140 S. Ct. 1247 (2020).

Jackson filed his initial § 2255 motion the Supreme Court in *Rehaif* construed § 922(g) in a manner that might have provided him, at the time of his motion, a basis for relief does not render the remedy provided by his initial § 2255 motion inadequate or ineffective," as required under the saving clause. Pet. App. 6a. Therefore, petitioner was barred from "pursu[ing] his *Rehaif* argument in a § 2241 petition." *Ibid*.

REASONS FOR GRANTING THE WRIT

This Court has been presented with repeated opportunities to resolve the circuit conflict presented here, including by the Government. The Court has nonetheless denied those petitions. The Government has suggested that the Court has decided the conflict simply does not warrant review. That is implausible, for reasons the Solicitor General once gave and others have since given. And if the Court agrees with the United States and the multiple lower court judges who have argued that the question merits this Court's review, this petition provides the Court a vehicle for resolving the conflict.

I. The Courts Of Appeals Are Deeply Divided Over The Question Presented.

As the Solicitor General has explained, an "entrenched conflict exists in the courts of appeals on whether the saving clause allows a defendant who has been denied Section 2255 relief to challenge his conviction or sentence based on an intervening decision of statutory interpretation." Pet. at 23, *United States v. Wheeler*, No. 18-420 (Oct. 3, 2018). Numerous courts of appeals and judges have also

acknowledged this split.[4] Commentators have as well. *See, e.g.*, Brian R. Means, *Federal Habeas Manual* § 1:29, Westlaw (database updated 2020) (describing split).

A. The Majority Of Circuits Allow Saving Clause Petitions That Raise Claims Previously Barred By Circuit Precedent That Has Since Been Overruled.

Nine courts of appeals permit saving clause petitions, at least under some circumstances, when circuit precedent precluded the petitioner's claim at the time of his original Section 2255 motion, but that precedent has since been overruled. *See United States v. Barrett*, 178 F.3d 34, 51-52 (1st Cir. 1999); *Triestman v. United States*, 124 F.3d 361, 363 (2d Cir.

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[4] *See, e.g.*, *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013) ("There is a deep and mature circuit split on the reach of the savings clause."), *overruled by McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc); *Wright v. Spaulding*, 939 F.3d 695, 710 (6th Cir. 2019) (Thapar, J., concurring) (urging this Court to "step in," sooner rather than later, because "[t]he circuits are already split"); *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179 (3d Cir. 2017) ("Nine of our sister circuits agree, though based on widely divergent rationales, that the saving clause permits a prisoner to challenge his detention when a change in statutory interpretation raises the potential that he was convicted of conduct that the law does not make criminal."); 868 F.3d at 180 ("Two circuits see things differently, holding that an intervening change in statutory interpretation cannot render § 2255 inadequate or ineffective."); *Prost v. Anderson*, 636 F.3d 578, 599 (10th Cir. 2011) (Seymour, J., concurring in part and dissenting in part) ("Respectfully, any implication by the majority that it is not creating a circuit split is flatly wrong.") (internal citation omitted).

1997); *In re Dorsainvil*, 119 F.3d 245, 247-48, 251 (3d Cir. 1997); *United States v. Wheeler*, 886 F.3d 415, 434 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1318 (2019); *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 Davenport*, 147 F.3d 605, 611 (7th Cir. 1998); *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *see also Abdullah v. Hedrick*, 392 F.3d 957, 963 (8th Cir. 2004).

As the Government recently put it, these circuits "generally require[] a prisoner to demonstrate a 'material change in the applicable law' since his initial Section 2255 motion that undermines his conviction—for example, by indicating that his conduct was not in fact a crime on a ground that previously was foreclosed by controlling precedent." U.S. BIO at 17, *Hueso v. Barnhart*, No. 19-1365 (Sept. 11, 2020) (citation omitted).

To be sure, there is some variation among the majority circuits. For example, some have described the Ninth Circuit's test as allowing any claim that had not yet been established at the time of the first Section 2255 petition. *See Prost v. Anderson*, 636 F.3d 578, 589-96 (10th Cir. 2011). And the Second Circuit casts its test in somewhat different language, allowing a petition whenever "serious constitutional questions would arise if a person who can prove his actual innocence on the existing record—and who could not have effectively raised his claim of innocence at an

earlier time—had no access to judicial review." *Triestman*, 124 F.3d at 363.[5]

But these differences should not be overstated. The Second Circuit has stated that its test is "similar" to the rules applied by other courts; the Third Circuit has highlighted the "common theme" uniting the approaches; and the Ninth Circuit has described its rule as being shared by "many of our sister circuits." *Cephas v. Nash*, 328 F.3d 98, 104 n.6 (2d Cir. 2003); *United States v. Brooks*, 230 F.3d 643, 648 (3d Cir. 2000); *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (aligning Ninth Circuit rule with rules in Second, Third, Fourth, Fifth, Seventh, Eighth, and, at the time, Eleventh Circuits).

B. Two Courts Of Appeals Take The Opposite Position.

The Tenth and Eleventh Circuits' approach stands in stark contrast to the majority view. These courts hold that even when binding circuit precedent foreclosed a claim, and even if the prisoner is actually innocent of the crime for which he is imprisoned as a result of that precedent being overruled, because the petitioner was *technically* allowed to raise that certain-to-lose claim in a first Section 2255 motion, that motion was not "inadequate or ineffective" to test the legality of detention as required to invoke the saving clause.

1. As discussed earlier, in *Prost*, then-Judge Gorsuch wrote "that the plain language of § 2255

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[5] There is also a disagreement over what evidence the Government can rely upon in resisting a saving clause petition. *See infra* n.10.

means what it says and says what it means: a prisoner can proceed to § 2241 only if his initial § 2255 motion was *itself* inadequate or ineffective to the task of providing the petitioner with a *chance* to *test* his sentence or conviction." 636 F.3d at 587. In so holding, the court rejected the "novelty" test, under which the saving clause is open when a legal argument had not been "in circulation at the time of his first § 2255 motion," as well as the "erroneous circuit foreclosure" test allowing saving clause petitions when the circuit law at the time of the initial motion plainly foreclosed the claim. *Id.* at 589-93. Instead, the court held that the saving clause only reaches cases in which a petitioner physically cannot file the Section 2255 motion—for example, where the sentencing court has been "abolished" or "literally dissolve[d]." *See id.* at 588. Therefore, so long as a petitioner *could* have raised a (doomed-to-fail) claim in a Section 2255 petition, the Tenth Circuit bars relief.

Like the panel decision, the order denying rehearing en banc in *Prost* was divided, with five judges voting to grant rehearing and five opposing. Order at 1-2, *Prost*, *supra* (May 26, 2011).

2. Before *Prost*, the Eleventh Circuit had sided with the majority view and permitted saving clause petitions based on intervening decisions of statutory interpretation. *See Wofford v. Scott*, 177 F.3d 1236, 1244 (11th Cir. 1999), *overruled by McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc). But in *McCarthan*, the Eleventh Circuit overruled itself, relying in part on *Prost*. In a 6-5 splintered decision that generated six different opinions, the majority held that "a change in caselaw does not make a motion to vacate a prisoner's sentence

'inadequate or ineffective to test the legality of his detention,' 28 U.S.C. § 2255(e)." 851 F.3d at 1080.

II. This Court Should Grant Certiorari To Resolve The Circuit Conflict.

Despite acknowledging the split and having asked the Court to resolve it in the past, the United States has repeatedly opposed certiorari in a number of subsequent cases, largely on two grounds. First, it has suggested that the Court has decided to tolerate the conflict. *See, e.g.*, U.S. BIO at 18-19, *Hueso*, *supra*. ("The circuit conflict therefore does not warrant this Court's review any more than it did before."). The Solicitor General has further argued that every petition since the Government's was a poor vehicle. *See, e.g.*, *ibid*. The first ground is not plausible, and the second is no barrier to granting certiorari here.

A. The Court Should Not Allow The Division In The Circuits To Endure.

It would be shocking if the Court had decided that the circuit conflict should be left unresolved.

1. The Question Presented Is One Of Recurring Importance.

The subject of the conflict is indisputably important. The individual stakes are enormous, with the answer to the question presented determining whether individuals who were wrongly convicted of non-existent crimes will remain incarcerated or allowed their freedom (or at least a new trial). At the same time, the depth of the split demonstrates that question is recurring. Indeed, this is the rare situation in which every regional court of appeals has weighed in on the question. *See supra* § I. The sheer number

of petitions for certiorari raising the question further confirms the frequency with which the issue arises.

Moreover, there is no reason to think this question will diminish in importance over time. To the contrary, the issue will arise every time this Court changes the interpretation of a federal criminal statute, calling into question the convictions of those denied 2255 relief under the circuit precedent that is overturned. This happens regularly. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191 (2019); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Santos*, 553 U.S. 507 (2008); *Begay v. United States*, 553 U.S. 137 (2008). And every time it happens, saving clause petitions follow. *See, e.g.*, *Dembry v. Hudson*, 796 Fed. Appx. 972, 975 (10th Cir. 2019) (*Rehaif* claim); *Wright v. Spaulding*, 939 F.3d 695, 705 (6th Cir. 2019) (*Mathis* claim); *McCarthan*, 851 F.3d at 1080 (*Chambers* claim); *Prost*, 636 F.3d at 581 (*Santos* claim); *Light v. Caraway*, 761 F.3d 809, 814 (7th Cir. 2014) (*Begay* claim).

2. The Circuit Split Is Intolerable.

The disarray and confusion over when and how to apply the saving clause leads to inexcusably disparate treatment of similarly situated individuals. Take the case of the Bruce brothers. In *Bruce v. Warden Lewisburg USP*, 868 F.3d 170 (3d Cir. 2017), the Third Circuit explained how two brothers were convicted of the same federal offenses, but only one was permitted to file a saving clause petition (because he was imprisoned in the Third Circuit) while the other was not (because he was held in the Eleventh). *Id.* at 180-81. The court lamented the "disparate treatment" of

the brothers and stressed that these "difficulties" are bound to "remain, at least until Congress or the Supreme Court speaks on the matter." *Ibid.*

As *Bruce* illustrates, this disparity in treatment is particularly irrational because availability of the saving clause depends on the petitioner's place of confinement, not conviction. *See Rumsfeld v. Padilla*, 542 U.S. 426, 442-43 (2004). Therefore, "the vagaries of the prison lottery will dictate how much postconviction review a prisoner gets. A federal inmate in Tennessee can bring claims that would be thrown out were he assigned to neighboring Alabama. Like cases are not treated alike." *Wright*, 939 F.3d at 710 (Thapar, J., concurring).

Finally, the risk of irrational disparate treatment is significant. At present, nearly 25,000 prisoners are housed in federal Bureau of Prisons and private facilities within the Tenth and Eleventh Circuits—roughly 16% of the federal prison population.[6]

It is hardly surprising, then, that prominent jurists throughout the Nation have called for resolution of the question presented. For example, then-Judge Barrett, describing the state of affairs in just the Seventh Circuit, remarked that "the complexity of our cases in this area is 'staggering.' We have stated the 'saving clause' test in so many

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[6] This number was calculated by adding the number of prisoners held in facilities in Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming, Alabama, Florida, and Georgia and then dividing by the total federal prison population. *See Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/mobile/about/population_statistics.jsp#pop_totals (last updated Dec. 24, 2020).

different ways that it is hard to identify exactly what it requires." *Chazen v. Marske*, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring). Similarly, Judge Thapar in the Sixth Circuit has urged this Court to "step in" sooner rather than later because "[t]he circuits are already split. The rift is unlikely to close on its own." *Wright*, 939 F.3d at 710 (Thapar, J., concurring). Dissenting from denial of rehearing en banc in *Wheeler*, Judge Agee described the question presented as one of "significant national importance" that was "best considered by the Supreme Court at the earliest possible date." *United States v. Wheeler*, 734 Fed. Appx. 892, 893 (4th Cir. 2018). The Court should heed those pleas and end the delay in resolving this persistent and untenable conflict.

B. This Case Presents An Appropriate Vehicle For Resolving The Conflict.

As noted above, the Government has previously agreed that there is a circuit split and that the Court should resolve it. But ever since its own petition was denied, the Solicitor General has found vehicle problems with every other petition seeking to raise the question. This case, however, avoids the problems the Government has identified in many prior cases and presents the Court an appropriate vehicle for finally resolving the conflict.

1. In several cases, the Government opposed certiorari by arguing that the petitioner would not have been allowed to bring a saving clause petition in *any* circuit, even the most favorable ones. *See, e.g.*, U.S. BIO at 16, *Higgs v. Wilson*, No. 19-401 (Dec. 18, 2019); Gov't BIO at 27, *McCarthan v. Collins*, No. 17-85 (Oct. 30, 2017). Not so here.

As the United States has recently described, the majority circuits

> generally have granted relief only when a prisoner can show (1) that his claim was foreclosed by (erroneous) precedent at the time of his sentencing, direct appeal, and initial motion under Section 2255; and (2) that an intervening decision, made retroactive on collateral review, has since established that he is in custody for an act that the law does not make criminal, has been sentenced in excess of an applicable maximum under a statute or under a mandatory sentencing guidelines regime, or has received an erroneous statutory minimum sentence.

U.S. BIO at 19, *Hueso*, *supra*.

Petitioner can satisfy both requirements. First, unlike some prior cases,[7] there can be no doubt that petitioner's *Rehaif* claim was foreclosed by erroneous circuit precedent at the time of his sentencing, direct appeal, and initial Section 2255 petition.[8] Moreover,

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[7] *See, e.g.*, U.S. BIO at 13-14, *Dyab v. United States*, No. 19-5241 (Oct. 28, 2019); U.S. BIO at 19-20, *Hueso*, *supra*; U.S. BIO at 19, *Quary v. English*, No. 19-5154 (Dec. 4, 2019).

[8] *See, e.g.*, *United States v. Games-Perez*, 667 F.3d 1136, 1140 (10th Cir. 2012) (noting that "[o]ur circuit has expressly held that" the government need only prove knowledge of firearm possession); *United States v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996) (holding that "knowledge concerning the status of his prior convictions" is not "an element of § 922(g)(1)"); *United States v. Thomas*, 615 F.3d 895, 899 (8th Cir. 2010) (argument that the government must "prove a defendant knew of his status as a

there can be no dispute that this precedent was overturned by *Rehaif*. *See, e.g.*, *United States v. Davies*, 942 F.3d 871, 873-74 (8th Cir. 2019) (acknowledging *Rehaif* overturned circuit precedent on mens rea requirements for felon-in-possession convictions); *United States v. Trujillo*, 960 F.3d 1196, 1200-01 (10th Cir. 2020) (same), *petition for cert. pending*, No. 20-6162 (filed Oct. 23, 2020).

Next, because the indictment and jury instructions omitted a critical element of the offense, and because the Government presented no evidence to establish that element, petitioner is "in custody for an act that the law does not make criminal." U.S. BIO at 19, *Hueso*, *supra*. The Fifth Circuit's decision in *Santillana v. Upton*, 846 F.3d 779 (5th Cir. 2017), is instructive. There, the court explained that "when determining whether a petitioner can show that he may have been convicted of a nonexistent offense, we must look to what the factfinder actually decided." *Id.* at 784. To do so, the court "look[s] to the indictment and jury instructions," to determine whether what the jury found amounted to a crime. *Id.* at 784-85.

Here, the indictment did not allege, and the jury instructions did not ask the jury to decide, whether

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felon" is "foreclosed"); *United States v. Jones*, 266 F.3d 804, 810 n.5 (8th Cir. 2001) ("The government need not prove knowledge [of his prior felony convictions], but only the fact of a prior felony conviction"); *United States v. Kind*, 194 F.3d 900, 907 (8th Cir. 1999) (rejected defendant's claim "that a defendant must know his status as a convicted felon to violate § 922(g)(1)" and noting that "it is well settled in this circuit that the government need only prove defendant's status as a convicted felon and knowing possession of the firearm").

petitioner *knew* he had been convicted of a felony.[9] Therefore, as in *Santillana*, "[b]ased on the indictment and instruction, we cannot say that the jury found" the facts necessary to establish all the elements of the charged offense. 846 F.3d at 784-85.[10]

2. This case also does not present other case-specific problems the Government has identified in other petitions.

For example, the Government recently opposed certiorari on the ground that although the petitioner's claim would have been foreclosed in the circuit of his conviction, it was unclear whether it was foreclosed in the circuit in which he filed his habeas petition.[11] No such complication arises in this case because petitioner's claim was foreclosed in his circuit of conviction and circuit of confinement. *See supra* n.8.

Unlike some other cases,[12] although petitioner proceeded pro se below, the issue was pressed and passed upon. *See* Pet. App. 3a-6a. Nor are there any mootness concerns here.[13] And the case does not raise any question whether "the computation of a

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[9] As noted, the parties stipulated to the fact that petitioner had been previously *convicted* of such crimes, but not to his *knowledge* of the crimes' potential sentences. *See supra* at 5.

[10] There is another circuit conflict over whether the Government can rely on evidence outside the record to resist a defendant's invocation of the saving clause. *Compare, e.g.*, *Santillana*, 846 F.3d at 784, *with Martin*, 319 F.3d at 804.

[11] *See, e.g.*, U.S. BIO at 21-22, *Hueso*, *supra*.

[12] *Cf.* U.S. BIO at 25, *Jones v. Underwood*, No. 18-9495 (Sept. 27, 2019); U.S. BIO at 18, *Walker v. English*, No. 19-52 (Sept. 27, 2019).

[13] *Cf.* BIO at 11-19, *Wheeler*, *supra*.

sentencing guidelines range that is merely advisory" is cognizable on collateral review.[14]

3. The United States may argue that it *could have* pleaded and proved the missing element. *See, e.g.*, Gov't BIO at 29, *McCarthan*, *supra* (opposing on ground petitioner would not prevail in habeas petition). But the court of appeals did not decide the case on that ground; instead, it applied its rule that relieved the Government of even responding to the petition, much less proving harmless error. In similar circumstances, this Court has frequently decided the threshold question upon which the circuits are in conflict and remanded to allow the Government to raise harmless error and other alternative grounds for defending the judgment. *See, e.g.*, *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018); *McFadden v. United States*, 576 U.S. 186, 197 (2015); *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011); *Staub v. Proctor Hosp.*, 562 U.S. 411, 422-23 (2011); *Skilling v. United States*, 561 U.S. 358, 414 n.46 (2010); *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008) (per curiam).

Moreover, it is an open question in this Court "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error." *United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (granting certiorari to answer that question, but failing to reach it). In a related context, the Third Circuit recently rejected the Government's attempt to rely on extra-record evidence to defeat relief on a *Rehaif* error, explaining that "even on plain-error review, basic constitutional principles

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[14] U.S. BIO at 18, *Higgs*, *supra*; *see* Gov't Mem. Opp. at 5, *Lewis v. English*, No. 18-292 (Nov. 7, 2018).

require us to consider only what the government offered in evidence at the trial, not evidence it now wishes it had offered." *United States v. Nasir*, 982 F.3d 144, 162 (3d Cir. 2020). Were the Government to raise a harmless-error claim here, the Court could elect to use this case to resolve the question it left open in *Resendiz-Ponce*. *See* 549 U.S. at 117 (Scalia, J., dissenting) (noting "the full Court will undoubtedly have to speak to the point on another day").

III. The Tenth Circuit's Decision Is Wrong.

The Government's position on the question presented has vacillated over the years.[15] From 2011 to 2017, the Solicitor General agreed with the circuit majority view and criticized the Tenth Circuit's contrary rule as an "overly restrictive interpretation of Section 2255(e),"[16] that was "refuted by Section 2255(e)'s text, when read as a whole."[17] The Government even went so far as to support the petition for rehearing en banc in *Prost*.[18] The United States has since switched positions. But its flip-flopping on the question presented reinforces the need for the Court's review.

Even if the Court thought that the Government's present position is the correct one, that would be a very substantial reason to grant certiorari. On the

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[15] *See* Gov't BIO at 11-15, *McCarthan*, *supra* (explaining that the Government has changed its position twice between 1994 and 2017).

[16] Gov't BIO at 21, *Williams v. Hastings*, No. 13-1221 (July 30, 2014).

[17] U.S. Supp. Br. at 32, *United States v. Surratt*, No. 14-6851 (4th Cir. Feb. 2, 2016).

[18] *See* Gov't BIO at 18-19, *Prost v. Anderson*, No. 11-249 (Nov. 25, 2011).

Government's view, fully nine of the circuits—home to the vast majority of federal inmates—are "render[ing] AEDPA's restrictions on second or successive motions largely self-defeating" and disrespecting "the balance Congress struck between finality and error-correction." U.S. BIO at 15, *Hueso*, *supra*.

In fact, the majority position has the better of the interpretive dispute. That is a reason to grant certiorari, too, because it means that two circuits with substantial prison populations are depriving individuals of their only meaningful opportunity to end incarcerations shown to be unlawful by late-breaking decisions of this Court.

1. Under Section 2255(e), the availability of the saving clause depends on whether a Section 2255 motion "appears . . . inadequate or ineffective to test the legality of [petitioner's] detention." 28 U.S.C. § 2255(e). Where erroneous circuit precedent foreclosed a claim or argument at the time of a prisoner's first Section 2255 motion, "the § 2255 remedy failed to provide a prisoner with even one *meaningful* opportunity to raise his claim of actual innocence." *Prost*, 636 F.3d at 606 (Seymour, J., concurring in part and dissenting in part). "The notion that an actually innocent prisoner can adequately and effectively 'test' the legality of his conviction when he has no legal basis in his circuit for doing so cannot be squared with this central purpose of habeas review or the plain language of the savings clause." *Ibid.*

To buy the minority circuits' position, one would have to believe that the chance of obtaining en banc review in the court of appeals or obtaining a writ of certiorari in this Court to reverse that binding precedent is adequate and effective to actually *test* the

legality of detention. *See Prost*, 636 F.3d at 590-91. But the proposition that such discretionary review provides an adequate means of testing the legality of a petitioner's confinement defies common sense. Those mechanisms do not require any judge to ever actually decide whether a prisoner's confinement is legal or not. Courts sitting en banc, and this Court in reviewing petitions for certiorari, routinely deny review of meritorious claims for reasons having nothing to do with whether a prisoner is unlawfully imprisoned under the best view of the law.[19]

Take this case as an example. Had petitioner argued in his initial Section 2255 motion that the Government needed to plead and prove that he knew his felon status, the district court and appellate panel would have been bound by circuit precedent to reject the argument regardless of its merits. A petition for rehearing en banc would have been pointless because there was no inter- or intra-circuit conflict on the question—until this Court's decision in *Rehaif*, the circuits were aligned in refusing to require proof of the defendant's knowledge of his status. *See* U.S. BIO at 5-6, *Rehaif*, *supra* (surveying case law). Given this lack of a circuit conflict, petitioner would have had no

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[19] As a result, rehearing or certiorari is granted in a vanishingly small percentage of cases. "For example, looking at the data from 2001 to 2009, the frequency of en banc cases in each circuit . . . based on the percentage of en banc cases of a circuits' total docket, was: . . . 0.19 percent in the Tenth Circuit." Note, Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 Fordham L. Rev. 2001, 2015 n.128 (2014). Similarly, in the 2016 Term, this Court granted review in 1.2% of petitions considered. *The Statistics*, 131 Harv. L. Rev. 403, 410 (2017).

reason to think that a petition for certiorari had any prospect of success either. *See id.* at 7-8 (documenting repeated denials of cert. petitions raising *Rehaif* question).

Therefore, it is entirely possible in a case like this that every single judge presented with a petitioner's claim could *think* that his detention is unlawful, and yet still deny him relief.

The Government would interpret the statute's reference to an "inadequate" opportunity to mean "no" opportunity, and an "ineffective" remedy to mean one in which success is "impossible." If Congress had meant that, it could have simply allowed a habeas petition when a remedy by motion "is unavailable." But "inadequate" means "not enough or good enough," and "ineffective" often means "not capable of performing efficiently or as expected." [20] If, for example, the only way to obtain compensation for a takings were to petition the legislature for a private bill, no one would consider that remedy "adequate" or "effective," even though the relief is not technically unavailable or impossible. Likewise, the Court has recognized that an attorney can be "ineffective" even if not completely absent and even if there is some possibility that the attorney could have won the case despite her deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The opportunity to challenge a conviction by filing a hopeless petition for rehearing or certiorari is an

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[20] *See Inadequate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/inadequate (last visited Dec. 29, 2020); *Ineffective*, Merriam-Webster, https://www.merriam-webster.com/dictionary/ineffective (last visited Dec. 29, 2020).

"inadequate" or "ineffective" means for testing the legality of detention under any ordinary meaning of those words.

2. The Government has nonetheless argued that this common-sense reading of the language is "at cross-purposes with Section 2255(h)." U.S. BIO at 13, *Hueso*, *supra*. In that provision, Congress limited second and successive Section 2255 motions to cases raising newly discovered evidence or relying on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h). The Government has reasoned that this demonstrates that Congress did not intend prisoners to obtain relief from convictions rendered unlawful by this Court's correction of erroneous interpretations of criminal statutes. The saving clause provision, the Government argues, should not open a door Congress closed in Section 2255(h)(2).

The United States has, itself, provided the rebuttal to this argument in the past, explaining that the Government's present position "requires drawing a negative inference about the meaning of the savings clause from Congress's inclusion of new constitutional decisions as a basis for a successive motion under Section 2255(h)(2), despite the absence of evidence that Congress ever contemplated statutory decisions." U.S. Supp. Reply Br. at 10, *United States v. Surratt*, No. 14-6851 (4th Cir. Mar. 9, 2016). If Congress had intended to entirely preclude relief even for retroactive statutory constructions that rendered a defendant innocent of his crime of conviction, Congress surely would have said so expressly.

The statute Congress actually wrote does not exclude cases in which the inadequacy or

ineffectiveness of a 2255 petition arises from the limits of the cause of action Section 2255 provides. It permits habeas review in *any* case in which 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention," full stop, with no qualifications. 28 U.S.C. § 2255(e). Indeed, in asking whether the "remedy by motion is inadequate or ineffective," Congress was plainly aware of the possibility that the ineffectiveness of the motion could arise from features of Section 2255 itself. That is why courts refer to it as a "saving clause"—it provides relief when Section 2255 otherwise would not.

3. It is hardly strange that Congress would have intended the saving clause to fill what would otherwise be a gaping hole in the statute. This Court has considered it "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a *meaningful* opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (citation and internal quotation marks omitted, emphasis added). "Claims of actual factual innocence," in particular, "have been recognized in constitutional and habeas jurisprudence as among 'the most compelling case[s] for habeas review.'" *Prost*, 636 F.3d at 600 (Seymour, J., concurring part and dissenting in part) (quoting *Murray v. Carrier*, 477 U.S. 478, 501 n.8 (1986) (Stevens, J., concurring in judgment)) (alteration in original). For example, in *Davis v. United States*, 417 U.S. 333, 346 (1974), the Court dealt with a Section 2255 case in which a petitioner claimed that his "conviction and punishment are for an act that the law does not make criminal," following an intervening

decision of law. The Court found the claim cognizable under that version of Section 2255, noting that "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances." *Id.* at 346-47 (internal quotation marks and alteration omitted). Members of this Court have more recently expressed a similar sentiment, for example, in *In re Davis*, 557 U.S. 952 (2009), where several Justices reiterated the importance that innocence claims get careful review.

It would be quite surprising, then, for Congress to have intended AEDPA to eliminate any avenue for relief for inmates whose convictions were rendered unlawful by a later Supreme Court decision. It would be doubly surprising if Congress elected to convey that decision through silence and implication. Far more likely is when Congress allowed successive 2255 motions for a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. § 2255(h)(2), it did so on the understandings that: (a) the principal function of the quoted language was to impose a retroactivity restriction on claims based on changes in constitutional law; (b) there was no need to place a retroactivity restriction on statutory claims, because all interpretations of federal criminal statutes are necessarily retroactive;[21] and (c) there was no need to provide for successive 2255 petitions for changes based

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[21] *See, e.g.*, *Santillana*, 846 F.3d at 782 (explaining that "new [Supreme Court] decisions interpreting federal statutes that substantively define criminal offenses automatically apply retroactively") (quoting *Garland v. Roy*, 615 F.3d 391, 396 (5th Cir. 2010)) (alteration in original); *see also Bruce*, 868 F.3d at 182 (same).

on statutory interpretation because those claims could be made under the existing saving clause provision.

Any other interpretation would raise serious constitutional concerns. *See, e.g.*, *Triestman*, 124 F.3d at 379 (noting "the distinct possibility that the continued incarceration of an innocent person violates the Eighth Amendment," and finding "that serious due process questions would arise if Congress were to close off all avenues of redress in such cases, especially when the prisoner could not have raised his claim of innocence—which appears on the record—in an effective fashion at an earlier time," and therefore permitting Section 2241 petition); *see also Davenport*, 147 F.3d at 611 (concluding that Government's present reading raises serious constitutional questions); *Dorsainvil*, 119 F.3d at 248 (same). After all, under "our federal system it is only Congress, not the courts, which can make conduct criminal." *Bousley v. United States*, 523 U.S. 614, 620-21 (1998). Precluding any meaningful avenue for relief for those incarcerated for conduct Congress never declared criminal would violate both the rights of the prisoner and the sovereign prerogatives of Congress.

4. Finally, the minority rule unnecessarily renders federal habeas review less efficient. Those circuits would have a habeas petitioner (who often proceeds pro se) raise every plausible claim in his initial motion, even claims that are plainly barred by circuit and even this Court's precedent, on the off chance that he can get that precedent reversed. The far more sensible approach is to discourage utterly hopeless claims, but then reopen the path if and when the law changes and draws into serious question the lawfulness of the petitioner's continued imprisonment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 31, 2020

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-3053

Michael Jackson,
Petitioner-Appellant,

v.

Don Hudson, Warden,
Respondent-Appellee.

D.C. No. 5:20-CV-03055-JWL (D. Kan.)

Filed August 4, 2020

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

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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 10th Circuit Rule 32.1.

Petitioner-Appellant Michael Jackson, proceeding pro se,[1] filed a 28 U.S.C. § 2241 petition in the United States District Court for the District of Kansas alleging that he is innocent in light of *Rehaif v. United States*, --- U.S. ----, 139 S. Ct. 2191 (2019). The district court dismissed this petition for lack of statutory jurisdiction. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court's judgment.

I

A jury convicted Mr. Jackson in the United States District Court for the Western District of Missouri of a violation of 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm. Given his prior convictions, Mr. Jackson was subject to the penalty-enhancement provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The district court sentenced him to 327 months' imprisonment. The Eighth Circuit affirmed his conviction and sentence. However, in 2005, the Supreme Court vacated the Eighth Circuit's judgment and remanded Mr. Jackson's case back to the Eighth Circuit for further consideration in light of *United States v. Booker*, 543 U.S 220 (2005). *See Jackson v. United States*, 543 U.S. 1103 (2005). On remand, the Eighth Circuit held that Mr. Jackson could not demonstrate plain error in connection with his sentence, and reinstated its vacated judgment. *See United States v. Jackson*, 163 F. App'x 451 (8th Cir. 2006) (per curiam)

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[1] Because Mr. Jackson is proceeding pro se, we construe his filings liberally, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *accord Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010), but "we will not 'assume the role of advocate,'" *United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

(unpublished). Mr. Jackson unsuccessfully sought relief under 28 U.S.C. § 2255, and was denied authorization to file a second motion under that section.

Subsequently, Mr. Jackson filed the § 2241 petition at issue here in federal court in the District of Kansas, challenging the validity of his conviction based on a recent decision of the United States Supreme Court *Rehaif v. United States* which held that to convict a criminal defendant under 18 U.S.C. § 922(g), the government must prove "*both* that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 139 S. Ct. at 2200 (emphasis added). Before *Rehaif*, the government could obtain a felon-in-possession conviction without proving that the defendant knew he had previously been convicted of a felony. *See, e.g.*, *United States v. Silva*, 889 F.3d 704, 711 (10th Cir. 2018) (citing *United States v. Benford*, 875 F.3d 1007, 1015 (10th Cir. 2017)).

Mr. Jackson argues that *Rehaif* "was a substantial change in the law" that renders him innocent of his felon-in-possession offense and that he should be permitted to proceed under § 2241. Aplt.'s Opening Br. at 3. This is because, he says, he has "exhausted all of his" rights under § 2255 and § 2241 "is the only portal avenue available to [him] for entry into this [c]ourt." *Id.* at 2 3. The district court rejected Mr. Jackson's argument and dismissed his § 2241 petition for lack of statutory jurisdiction. In pertinent part, the court determined that Mr. Jackson could not avail himself of § 2241 because he failed to demonstrate that the remedy provided by his initial § 2255 motion was "inadequate or ineffective" within the meaning of § 2255(e)'s so-called savings clause. R. at 29, 30 (Dist. Ct. Mem. &

Order, filed Feb. 21, 2020) (quoting *Prost v. Anderson*, 636 F.3d 578, 586 (10th Cir. 2011), which in turn quotes § 2255(e)).

II

We review de novo the district court's dismissal of Mr. Jackson's § 2241 petition for lack of jurisdiction. *See Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir. 2011).

When a federal prisoner is denied relief on his first § 2255 motion, as happened here, the prisoner cannot file a second § 2255 motion unless he can point to either "newly discovered evidence" or a "new rule[] of constitutional law," as those terms are defined in § 2255(h). *Prost*, 636 F.3d at 581. A prisoner is permitted, however, to file a habeas petition in the federal district in which he is incarcerated under § 2241, but only if he first demonstrates under § 2255(e)'s savings clause that the remedy provided under § 2255 was "inadequate or ineffective" at the time of his initial § 2255 motion. *See* 28 U.S.C. § 2255(e) (noting the operative condition as "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention"); *Prost*, 636 F.3d at 589 ("[I]t is the infirmity of the § 2255 remedy itself, not the failure to use it or to prevail under it, that is determinative. To invoke the savings clause, there must be something about the initial § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention."); *accord Abernathy v. Wades*, 713 F.3d 538, 547 (10th Cir. 2013).

The savings clause that is, § 2255(e) is only satisfied "in extremely limited circumstances." *Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999); *cf.*

Brace, 634 F.3d at 1169 (stating that "§ 2255 will rarely be an inadequate or ineffective remedy to challenge a conviction"). Focusing on matters relevant here, a panel of our court recently summarized well *Prost*'s reasoning:

> We explained [in *Prost*] that "[t]o invoke the savings clause, there must be something about the *initial* § 2255 procedure that *itself* is inadequate or ineffective for *testing* a challenge to detention." And "the fact that [a defendant] or his counsel may not have *thought* of [a novel statutory interpretation argument later approved by a court] earlier doesn't speak to the relevant question whether § 2255 *itself* provided [the defendant] with an adequate and effective remedial mechanism for testing such an argument."

Garcia v. Stancil, 808 F. App'x 666, 669 (10th Cir. 2020) (unpublished) (first alteration added) (first emphasis added) (citations omitted) (quoting *Prost*, 636 F.3d at 589); *see Lewis v. English*, 736 F. App'x 749, 752 (10th Cir. 2018) (unpublished) ("Lewis notes that several of our sibling circuits follow what's known as the erroneous-circuit-foreclosure test. Courts following that test apply the savings clause if a circuit court's subsequently overturned interpretation of a statute precluded relief at the time the § 2241 petitioner moved for relief under § 2255. But we *specifically rejected* that approach in *Prost*." (emphasis added) (citations omitted)), *cert. denied*, --- U.S. ----, 139 S. Ct. 1318 (2019). And "when a federal petitioner fails to establish that he has satisfied § 2255(e)'s saving clause test thus, precluding him from proceeding under § 2241 the court lacks statutory jurisdiction to hear his

habeas claims." *Abernathy*, 713 F.3d at 557; *accord Jones v. Goetz*, 712 F. App'x 722, 726 n.2 (10th Cir. 2017) (unpublished).

III

We conclude that the district court correctly dismissed Mr. Jackson's § 2241 petition for lack of statutory jurisdiction. That is because he has not shown that the remedy provided by his initial § 2255 motion was inadequate or ineffective, within the meaning of § 2255(e), to challenge his felon-in-possession conviction. Under *Prost*, the fact that *after* Mr. Jackson filed his initial § 2255 motion the Supreme Court in *Rehaif* construed § 922(g) in a manner that might have provided him, at the time of his motion, a basis for relief does not render the remedy provided by his initial § 2255 motion inadequate or ineffective. *See Prost*, 636 F.3d at 589; *accord Garcia*, 808 F. App'x at 669. Indeed, a panel of our court specifically held as much in the context of a § 2241 petition predicated on *Rehaif*, and we find that decision persuasive. *See Dembry v. Hudson*, 796 F. App'x 972, 975 (10th Cir. 2019) (unpublished) ("[T]hat *Rehaif* did not exist when Dembry initially filed his § 2255 motion or that adverse circuit precedent existed at the time does not render § 2255's procedure ineffective or inadequate. The savings clause in § 2255(e) does not apply here and the district court properly concluded it lacked jurisdiction to review Dembry's § 2241 petition." (citation omitted)). Accordingly, Mr. Jackson cannot pursue his *Rehaif* argument in a § 2241 petition. The district court correctly dismissed the petition for lack of statutory jurisdiction.

IV

For the foregoing reasons, we **AFFIRM** the district court's judgment.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 20-3055-JWL

Michael Jackson,
Petitioner,

v.

Don Hudson, Warden, USP-Leavenworth,
Respondent.

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under 28 U.S.C. § 2241. Petitioner, a prisoner at the United States Penitentiary, Leavenworth, seeks a remand for resentencing.

Background

Petitioner was convicted in the United States District Court for the Western District of Missouri of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Due to his prior convictions, the indictment also charged that the penalty-enhancement provisions of 18 U.S.C. § 924(e) applied. *United States v. Jackson*, 365 F.3d 649 (8th Cir. 2004). In 2005, his case was remanded to the Eighth Circuit for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005). *Jackson v. U.S.*, 543 U.S. 1103 (2005). On remand, the Eighth Circuit held that petitioner could not show plain error and reinstated the vacated

judgment. *United States v. Jackson*, 163 Fed. Appx. 451, 2006 WL 250481 (8th Cir. Feb. 3, 2006). The petitioner states that he unsuccessfully sought relief under 28 U.S.C. § 2255, and that he has been denied authorization to file a second motion under that section.

Petitioner now challenges the validity of his sentence under a recent decision by the United States Supreme Court holding that to convict a criminal defendant under 18 U.S.C. § 922(g), the government must prove "both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S.Ct. 2191, 2200 (2019).

Discussion

A federal prisoner seeking release from allegedly illegal confinement may file a motion to "vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). A motion under § 2255 must be filed in the district where the petitioner was convicted. *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010). Generally, the motion remedy under 28 U.S.C. § 2255 provides "the only means to challenge the validity of a federal conviction following the conclusion of direct appeal." *Hale v. Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016), *cert. denied sub nom. Hale v. Julian*, 137 S. Ct. 641 (2017). However, under the "savings clause" in § 2255(e), a federal prisoner may file an application for habeas corpus under 28 U.S.C. § 2241 in the district of confinement if the petitioner demonstrates that the remedy provided by § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

When a petitioner is denied relief under § 2255, he cannot file a second § 2255 motion unless he can point

to either "newly discovered evidence" or "a new rule of constitutional law," as those terms are defined in § 2255(h). *Haskell v. Daniels*, 510 F. App'x 742, 744 (10th Cir. 2013) (unpublished) (citing *Prost v. Anderson*, 636 F.3d 578, 581 (10th Cir. 2011)). Preclusion from bringing a second motion under § 2255(h) does not establish that the remedy in § 2255 is inadequate or ineffective. Changes in relevant law were anticipated by Congress and are grounds for successive collateral review only under the carefully-circumscribed conditions set forth in § 2255(h).

The Tenth Circuit has rejected the argument that a petitioner's "current inability to assert the claims in a successive § 2255 motion – due to the one-year time bar and the restrictions identified in § 2255(h) – demonstrates that the § 2255 remedial regime is inadequate and ineffective to test the legality of his detention." *Jones v. Goetz*, 712 Fed. Appx. 722, 2017 WL 4534760, at *5 (10th Cir. Oct. 11, 2017) (unpublished) (citations omitted). If § 2255 were deemed "inadequate or ineffective" "any time a petitioner is barred from raising a meritorious second or successive challenge to his conviction – subsection (h) would become a nullity, a 'meaningless gesture.'" *Prost*, 636 F.3d at 586.

Likewise, a petitioner may not invoke the savings clause unless the Supreme Court's newly-identified statutory interpretation is a new rule of constitutional law made retroactively applicable to cases on review. *See Abernathy v. Wandes*, 713 F.3d 538, 547(10th Cir. 2013) (the AEDPA "did not provide a remedy for second or successive § 2255 motions based on intervening judicial interpretations of statutes") *cert. denied*, 572 U.S. 1063 (2014). Those courts that have considered post-conviction challenges advanced under *Rehaif*

have uniformly held that it does not announce a new rule of constitutional law that applies retroactively to cases on collateral review. *See, e.g., In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019); *Khamisi-el v. United States*, __ Fed. Appx. ___, 2020 WL 398520 (6th Cir. Jan. 23, 2020) (denying authorization to present an amended motion under 28 U.S.C. § 2255 and holding that the rule stated in *Rehaif* is a matter of statutory interpretation and not a new rule of constitutional law)(citing *In re Palacios*); *United States v. Shobe*, 2019 WL 3029111, *2 (N.D. Okla. Jul. 11, 2019) (dismissing § 2255 claim for lack of jurisdiction based in part on *Rehaif*).

Having considered the petition, the Court finds petitioner has not shown that he is entitled to proceed under the savings clause and concludes this matter must be dismissed without prejudice for lack of jurisdiction.

IT IS, THEREFORE, BY THE COURT ORDERED the petition is dismissed.

IT IS SO ORDERED.

DATED: This 21st day of February, 2020, at Kansas City, Kansas.

S/ John W. Lungstrum
JOHN W. LUNGSTRUM
U.S. Senior District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

United States of America,	)	No. 02-00094-01/02-CR-W-3
	)	
Plaintiff,	)	Count One (Both Defendants)
	)	18 U.S.C. §§ 922(g)(1) & 924(e)
v.	)	[NLT: Fifteen Years Imprisonment; NMT: Life Imprisonment, $250,000 Fine, Five Years Supervised Release, Plus $100 Special Penalty Assessment]
Michael Jackson, [DOB: 06/22/59],	)	
Fabian Jackson, [DOB: 01/12/68],	)	
Defendants.	)	

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about March 1, 2002, in the Western District of Missouri, the defendants, MICHAEL JACKSON, and FABIAN JACKSON, each having been convicted of a crime punishable by imprisonment for a term exceeding one year, and each having been convicted of three violent felonies as defined in 18 U.S.C. § 924(e), committed on occasions different from one another, did knowingly possess in and affecting commerce a firearm, to wit, a Winchester, Model 70, 30-06 caliber rifle, Serial Number 738863, which had been transported in interstate commerce.

All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

A TRUE BILL.

5/21/02	/s/
DATE	FOREPERSON OF THE GRAND JURY

/s/
Bruce E. Clark, #31443
Assistant United States Attorney
Organized Crime Strike Force Unit
Western District of Missouri

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

USA,	)	Crim. No. 02-0094-01-
	)	02-CR-W-DW
vs.	)	
	)	
Michael Jackson	)	
Fabian Jackson	)	

August 26, 2002

Court's Source JURY INSTRUCTIONS – GIVEN.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

United States of America,	)	No. 02-00094-01/02-CR-W-ODS
Plaintiff,	)	
v.	)	
Michael Jackson, Fabian Jackson,	)	
Defendants.	)	

Filed August 9, 2002

GOVERNMENT'S PROPOSED INSTRUCTIONS

Comes now the United States of America, by and through its undersigned attorneys, and respectfully submits the proposed jury instructions listed below and attached hereto, for use by the Court during the trial of this matter. The United States reserves the right to supplement these proposed instructions as required to meet additional issues which may arise at trial.

* * *

INSTRUCTION NO. 2

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crimes charged, which the government must prove beyond a reasonable doubt to make its case:

COUNT ONE

One, Before March 1, 2002, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year;

Two, On or about March 1, 2002, the defendant knowingly possessed a firearm, that is, a Winchester, Model 70, 30-06 caliber rifle, Serial Number 738863; and,

Three, At some point prior to the defendant's possession of the firearm, it was transported across a state line.

Plaintiff's Instruction No. 2

SOURCE: Eighth Circuit Jury Instructions

Nos. 1.02 (Modified)

6.18.922 (Modified)

* * *

INSTRUCTION NO. 17

The crime of being a felon in possession of a firearm, as charged in Count One of the Indictment, has three essential elements, which are:

COUNT ONE

One, Before March 1, 2002, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year;

Two, On or about March 1, 2002, the defendant knowingly possessed a firearm, that is, a Winchester, Model 70, 30-06 caliber rifle, Serial Number 738863; and,

Three, At some point prior to the defendant's possession of the firearm, it was transported across a state line.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than Missouri and that the defendant possessed the firearm in the State of Missouri then you may, but are not required to, find that it was transported across a state line.

The term "firearm" means any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosion.

For you to find a defendant guilty of the crime charged, the government must prove all of these essential elements beyond a reasonable doubt; otherwise you must find the defendant not guilty of this crime.

Plaintiff's Instruction No. 16

SOURCE: Eighth Circuit Jury Instructions

No. 6.18.922 (as modified)

* * *