No. 20-911

In the Supreme Court of the United States

MICHAEL JACKSON, PETITIONER

v.

DON HUDSON, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The question presented is whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that his conviction for possessing a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e), is invalid under *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the Federal Reporter but is reprinted at 822 Fed. Appx. 821. The opinion and order of the district court (Pet. App. 8a-11a) is not published in the Federal Supplement 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, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on December 31, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2002, following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). 02-cr-94 Amended Judgment 1. The district court sentenced petitioner to 327 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed. 365 F.3d 649 (8th Cir. 2004). This Court vacated the Eighth Circuit's judgment and remanded for further consideration in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See 543 U.S. 1103 (2005). On remand, the Eighth Circuit found that petitioner could not demonstrate plain error in connection with *Booker* and thus "reinstate[d] the vacated judgment." 163 Fed. Appx. 451 (2006) (per curiam).

In 2005, petitioner filed a postconviction motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. 05-cv-261 D. Ct. Doc. 1 (Mar. 21, 2005). The district court denied petitioner's motion, 05-cv-261 D. Ct. Doc. 9 (Sept. 15, 2005), and declined to issue a certificate of appealability (COA), 05-cv-261 D. Ct. Doc. 14-1 (Nov. 9, 2005). The court of appeals likewise declined to issue a COA. 06-1604 C.A. Doc. 2056140 (June 14, 2006), cert. denied, 549 U.S. 1067 (2006) (No. 06-7350). In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of *Johnson* v. *United States*, 576 U.S. 591 (2015). 15-3472 C.A. Doc. 4395050 (May 3, 2016); see 16-cv-557 D. Ct. Doc. 1, at 1 (June 10, 2016). The district court denied that motion and declined to issue a COA. 16-cv-557 D. Ct. Doc. 9 (Aug. 31, 2016). The court of appeals likewise declined to issue a

COA. 17-1037 C.A. Doc. 4542521 (June 1, 2017), cert. denied, 139 S. Ct. 1165 (2019) (No. 18-6096).

In February 2020, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of Kansas, where he is confined. 20-cv-3055 D. Ct. Doc. 1 (Feb. 14, 2020). The district court dismissed the petition. Pet. App. 8a-11a. The court of appeals affirmed. *Id.* at 1a-7a.

1. On March 1, 2002, petitioner and his brother were in the process of burglarizing a residence in Clinton County, Missouri, when the owner returned home. 365 F.3d at 651-652. As soon as they were discovered, petitioner and his brother got into a truck and drove away. *Ibid.* The homeowner reported the incident to local authorities, who located the truck and, following a chase, apprehended petitioner and his brother. *Id.* at 652. A search of the truck led to the discovery of a rifle. *Ibid.* Subsequent investigation revealed that petitioner and his brother were convicted felons. *Ibid.*

A federal grand jury in the Western District of Missouri returned an indictment charging petitioner and his brother with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). See 365 F.3d at 652. During trial, the parties "stipulated and agreed" that at the time of the offense, petitioner "had been convicted of at least one felony offense, for which he could receive a term of imprisonment for greater than one year." 02-cr-94 8/26/2002 Tr. 55-56. The jury found petitioner guilty on the Section 922(g)(1) charge.

At the time of that offense, petitioner "had nine prior burglary convictions." 365 F.3d at 652; see Presentence Investigation Report (PSR) ¶¶ 31, 46-48, 54, 56, 61, 63;

see also PSR ¶¶ 46-47, 56, 58, 60-62, 65 (describing additional non-burglary felony convictions). The indictment had cited the penalty provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), under which a defendant with three or more prior convictions for "violent felon[ies]" or "serious drug offense[s]" "committed on occasions different from one another" is subject to a statutory-minimum sentence of 15 years of imprisonment, 18 U.S.C. 924(e)(1); see Sentencing Guidelines § 4B1.4; cf. Sentencing Guidelines § 4B1.1. The district court determined that petitioner was subject to an ACCA sentence, and sentenced petitioner to 327 months of imprisonment, which was within the then-mandatory Guidelines range, to be followed by five years of supervised release. See 365 F.3d at 651.

The court of appeals affirmed petitioner's conviction and sentence. 365 F.3d 649. In 2005, this Court granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Booker*, *supra*, which held that the Sentencing Guidelines should be treated as advisory, not mandatory, see *Booker*, 543 U.S. at 245. 543 U.S. at 1103. On remand, the court of appeals reaffirmed petitioner's 327-month sentence. 163 Fed. Appx. at 451.

2. In 2005, petitioner moved to vacate his sentence under 28 U.S.C. 2255. 05-cv-261 D. Ct. Doc. 1. The district court denied the motion and declined to issue a COA. 05-cv-261 D. Ct. Docs. 9 and 14. The court of appeals likewise declined to issue a COA and dismissed petitioner's appeal, 06-1604 C.A. Doc. 2056140. This Court denied certiorari. 549 U.S. at 1067 (No. 06-7350).

In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of *Johnson*, *supra*, which held that

the "residual clause" of the ACCA was unconstitutionally vague, see 576 U.S. at 606. 15-3472 C.A. Doc. 4395050. Petitioner thereafter filed a second Section 2255 motion in district court, claiming that he was wrongly classified and sentenced as an armed career criminal. See 16-cv-557 D. Ct. Doc. 1. The court denied that motion, finding that petitioner's "burglary convictions qualify as ACCA enumerated offenses" and, therefore, petitioner had at least "three qualifying ACCA convictions." 16-cv-557 D. Ct. Doc. 9, at 2. The court declined to issue a COA. *Ibid.* The court of appeals likewise declined to issue a COA, and dismissed petitioner's appeal. 17-1037 C.A. Doc. 4542521. This Court denied certiorari. 139 S. Ct. at 1165 (No. 18-6096).

3. In February 2020, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of Kansas, the district where he is confined. 20-cv-3055 D. Ct. Doc. 1. Petitioner claimed that he was entitled to collateral relief from his conviction under this Court's decision in *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). 20-cv-3055 D. Ct. Doc. 2 (Feb. 14, 2020). In *Rehaif*, this Court held that the government not only "must show that the defendant knew he possessed a firearm," but "also that he knew he had the relevant status"—for example, that he was a felon—"when he possessed it." 139 S. Ct. at 2194.

The district court dismissed petitioner's habeas petition for lack of jurisdiction. Pet. App. 8a-11a. The court explained that "[g]enerally, 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.'" Pet. App. 9a (quoting *Hale* v. *Fox*, 829 F.3d 1162, 1165 (10th Cir. 2016), cert. denied,

137 S. Ct. 641 (2017)). The court noted that under 28 U.S.C. 2255(e), a federal prisoner typically may not file a habeas corpus petition under Section 2241 unless, under Section 2255(e)'s "saving clause," the remedy provided by Section 2255 is "inadequate or ineffective to test the legality of his detention." Pet. App. 9a. The court also noted that when a movant "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)." *Id.* at 9a-10a (citation omitted).

The district court observed that under Tenth Circuit precedent, "[p]reclusion from bringing a second motion under § 2255(h) does not establish that the remedy in § 2255 is inadequate or ineffective." Pet. App. 10a. The court thus determined that "petitioner has not shown that he is entitled to proceed under the savings clause." *Id.* at 11a.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-7a. The court began by noting that under its precedent, the "savings clause, that is, § 2255(e) is only satisfied 'in extremely limited circumstances.'" *Id.* at 4a (quoting *Caravalho* v. *Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999)). The court then quoted a recent explanation by another Tenth Circuit panel, which itself relied on the court's prior decision in *Prost* v. *Anderson*, 636 F.3d 578, 586 (2011), cert. denied, 565 U.S. 1111 (2012):

> We explained in *Prost* that "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." 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."

Pet. App. 5a (brackets and citation omitted).

The court of appeals here explained that "[u]nder *Prost*, the fact that *after* [petitioner] 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." Pet. App. 6a (citing *Prost*, 636 F.3d at 589). The court observed that an unpublished decision by another "panel of our court specifically held as much in the context of a § 2241 petition predicated on *Rehaif*, and we find that decision persuasive." *Ibid.* The court thus determined that "'[t]he savings clause in § 2255(e) does not apply here'"; petitioner "cannot pursue his *Rehaif* argument in a § 2241 petition"; and the "district court correctly dismissed the petition for lack of statutory jurisdiction." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 10-30) that his claim of error under *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), entitles him to relief in a habeas petition filed pursuant to 28 U.S.C. 2241. That contention implicates a circuit conflict about the availability of habeas relief for statutory claims under the saving clause in 28 U.S.C. 2255(e). This Court has recently and repeatedly denied petitions for a writ of certiorari seeking review of the circuit conflict on the scope of the saving clause. *E.g.*, *Williams* v. *Coakley*, 141 S. Ct. 908 (2020) (No. 20-5172); *Hueso* v. *Barnhart*, 141 S. Ct. 872 (2020) (No. 19-1365); *Higgs* v. *Wilson*, 140 S. Ct. 934 (2020) (No.

19-401); *Walker* v. *English*, 140 S. Ct. 910 (2020) (No. 19-52); *Quary* v. *English*, 140 S. Ct. 898 (2020) (No. 19-5154); *Jones* v. *Underwood*, 140 S. Ct. 859 (2020) (No. 18-9495); *Dyab* v. *English*, 140 S. Ct. 847 (2020) (No. 19-5241); *United States* v. *Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420). The court of appeals' unpublished opinion does not deepen that conflict, and petitioner's *Rehaif* claim would not prevail in any circuit. Further review is unwarranted.

As explained on pages 11 to 13 of the government's brief in opposition in *Davis* v. *Quay*, No. 20-6448 (filed Apr. 12, 2021), a copy of which the government is serving on petitioner's counsel, the courts of appeals are divided on the availability of saving-clause relief for statutory claims. The Tenth and Eleventh Circuits have determined that habeas relief based on a retroactive rule of statutory construction is unavailable under the saving clause. See Pet. App. 5a-6a; *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1086 (en banc), cert. denied, 138 S. Ct. 502 (2017); *Prost* v. *Anderson*, 636 F.3d 578, 590-591 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012). By contrast, nine courts of appeals would permit such relief in some circumstances. See Br. in Opp. at 12-13, *Davis* v. *Quay*, *supra* (No. 20-6448).

But notwithstanding that circuit conflict and its importance, this Court has recently and repeatedly declined to review the issue, including when it was raised in the government's petition for a writ of certiorari in *United States* v. *Wheeler*, *supra* (No. 18-420). *E.g.*, *Williams* v. *Coakley*, *supra* (No. 20-5172); *Hueso* v. *Barnhart*, *supra* (No. 19-1365); *Higgs* v. *Wilson*, *supra* (No. 19-401); *Walker* v. *English*, *supra* (No. 19-52); *Quary* v. *English*, *supra* (No. 19-5154); *Jones* v. *Underwood*,

supra (No. 18-9495); *Dyab* v. *English*, *supra* (No. 19-5241). The division of authority on whether the saving clause is ever available for statutory claims precluded by Section 2255(h) is unchanged since that time. Indeed, the court of appeals here simply followed its previous holding in *Prost*, as it was bound to do. Pet. App. 4a-6a.

In any event, this would be an unsuitable vehicle in which to review that conflict because petitioner would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable view of the saving clause. To the government's knowledge, no court of appeals has granted a federal prisoner collateral post-conviction relief under Section 2255 or Section 2241 based on *Rehaif* in comparable circumstances. As relevant here, more prisoner-friendly circuits generally require a prisoner to show that recent legal developments establish that he is in prison for conduct that the law does not make criminal. See, *e.g.*, *Alaimalo* v. *United States*, 645 F.3d 1042, 1047-1048 (9th Cir. 2011); *Triestman* v. *United States*, 124 F.3d 361, 379 (2d Cir. 1997).

Contrary to petitioner's suggestion (Pet. 20), petitioner is not in prison for a nonexistent offense. Petitioner instead merely contends that his conviction is invalid under *Rehaif* because the jury instructions did not explicitly require the jury to find that petitioner knew he was a convicted felon when he possessed the firearm. Pet. 20-21 (noting that "the jury instructions did not ask the jury to decide * * * whether petitioner *knew* he had been convicted of a felony"). The absence of a jury instruction, however, is not the sort of error as to which courts have allowed or should allow resort to the saving clause.

And even if petitioner could bring a challenge under Section 2241, his claim to relief under *Rehaif* lacks merit. Indeed, even a timely motion under Section 2255 in reliance on *Rehaif*'s adjusted mens rea requirement would not succeed without a stringent showing of actual innocence that petitioner here apparently seeks to avoid. Compare *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998) (explaining that relief on an analogous procedurally defaulted claim under Section 2255 required the movant to establish "actual innocence," which "means factual innocence, not mere legal insufficiency"), with Pet. 20-21. Furthermore, petitioner cannot show that the unraised error of omitting the knowledge-of-status element from the jury instructions at his trial had a "substantial and injurious effect or influence" on the verdict. *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993); cf. *Neder* v. *United States*, 527 U.S. 1, 9 (1999). Petitioner had "nine prior burglary convictions" at the time of his offense. 365 F.3d at 652; see PSR ¶¶ 31, 46-48, 54, 56, 61, 63. He also had several other felony convictions. See PSR ¶¶ 46-47, 56, 58, 60-62, 65. Those convictions—all of which were entered pursuant to guilty pleas—not only were "punishable by imprisonment for a term exceeding one year," 18 U.S.C. 922(g)(1), but 15 of them were actually punished by terms of imprisonment exceeding one year, see PSR ¶¶ 46-47, 54, 56, 60-62, 65. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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