No. 20-911

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

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY BRIEF OF PETITIONER

The Government acknowledges the circuit conflict and its importance. BIO 8. It does not claim that the conflict will resolve itself or that its persistence is tolerable. Yet, the Government opposes certiorari for two unconvincing reasons. First, it claims that this case does not implicate the conflict because petitioner would not be entitled to savings clause relief in any circuit. That is demonstrably incorrect. Second, the Government argues that this case is a poor vehicle because petitioner would lose his habeas claim on the merits. That argument is unfounded as well, depending on legal claims that are themselves the subject of divisions in the lower courts. In any event, the Government's arguments on the merits of petitioner's habeas petition are no impediment to deciding the threshold question of whether petitioner is even entitled to an adjudication of his claims. The Court can decide that threshold question and then, if necessary, remand for consideration of any harmless error argument, something it frequently does in cases like this. Pet. 22.

The Government's own amici explain why the Court should resist the United States' apparent strategy of delaying resolution of the conflict indefinitely by finding fault in every petition providing a chance to resolve it. In amici's view, the majority of circuits are applying the wrong legal rule, "eroding . . . the habeas system" and "impos[ing] real and increasing social costs on victims and the judiciary." Amicus Br. 22. Petitioner obviously disagrees about which side of the conflict is correct and who, as a consequence, is bearing the cost. Pet. 16-18. But there is no denying that whatever the answer to

the question presented, the continuation of the conflict only multiplies unfairness and undermines the integrity of our criminal justice system.

Amici also argue that there is a renewed urgency for this Court's intervention arising from the prospect that the Government is about to change its position – yet again – on the merits of the question presented. Amicus Br. 2 ("When the government aligns with the convicted in the lower courts, the opportunities for this Court to resolve this circuit split dramatically narrow or disappear."). And, in fact, the new Administration has conspicuously failed to defend the Tenth Circuit's rule, despite having vigorously defended it in past oppositions. *Compare* BIO 7-10, *with*, *e.g.*, U.S. BIO 10-17, *Hueso v. Barnhart*, No. 19-1365 (Sept. 11, 2020).

Absent this Court's immediate intervention, then, the inconsistency and unfairness respected jurists have been decrying for years will only get worse. Pet. 17-18. Opportunities to correct illegal convictions will be doled out based on the happenstance of the Bureau of Prisons' housing decisions. And given the prospect that the Government will now change its position, the availability of relief in some circuits may depend on individual judges' willingness to accept the Government's acquiescence to savings clause petitions when existing circuit precedent would not allow them.

Enough is enough. The circuit split is squarely presented on the facts of this case. None of the Government's vehicle objections suggest that the Court would fail to reach the merits of the question presented or be unable to resolve the conflict. The Court should not let another term slip away without ending this intolerable disarray in the law.

I. Petitioner Would Qualify For Savings Clause Relief In Multiple Circuits.

The Government argues that "petitioner would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable view of the saving clause," because those circuits require a petitioner to show "he is in prison for conduct that the law does not make criminal." BIO 9. In this case, the Government claims petitioner cannot make that showing because he merely complains of "[t]he absence of a jury instruction" on the mens rea element established in *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). BIO 9. Not so.

To start, petitioner does not raise some run-of-the-mill objection to a jury charge about witness credibility or what counts as relevant evidence. He claims (and the Government does not dispute) that the jury instructions omitted an essential element of the offense, as did the indictment (a distinct violation the Government ignores). Pet. 5-6, 22-23. Petitioner further alleges that based on the flawed jury instructions *and* the Government's undisputed failure to introduce any evidence to prove the element, the facts found by the jury – that petitioner possessed a firearm after having been previously convicted of a felony – do not constitute a crime under *Rehaif*'s explication of the offense. In other words, he was convicted of a non-existent offense. *See, e.g.*, *Garland v. Roy*, 615 F.3d 391, 393 (5th Cir. 2010).

To the extent the Government suggests that circuits would require petitioner to prove he is "actually innocent" in the sense that he would not be convicted if tried again on the basis of *other* evidence never presented to the jury, its own amici point out

that there is a circuit split on that question. *See* Amicus Br. 20. In fact, petitioner would have been entitled to pursue his habeas claim in at least the Fourth and Fifth Circuits, and perhaps others as well.

In *Hahn v. Moseley*, 931 F.3d 295 (4th Cir. 2019), the Government argued that to qualify under the savings clause, a defendant "must demonstrate actual innocence," invoking the standard for overcoming procedural default under *Schlup v. Delo*, 513 U.S. 298 (1995). *Hahn*, 931 F.3d at 302. Under *Schlup*, a court may look at all available evidence, even information never submitted to the jury. *See id*. at 304 (Wynn, J., concurring) (explaining standard); *see also Schlup*, 513 U.S. at 328. But the *Hahn* court held that "the Fourth Circuit does not require actual innocence analysis under the savings clause." 931 F.3d at 302. Instead, the Fourth Circuit standard asks whether "the conduct *of which the prisoner was convicted* is deemed not to be criminal" under current law. *Id*. at 301 (citation omitted, emphasis added); *see also id*. at 304-07 (Wynn, J., concurring) (explaining that the "plain meaning of the phrase 'the conduct of which the prisoner was convicted' refers to the conduct that a jury found beyond a reasonable doubt") (citation omitted). In applying the savings clause, then, the Fourth Circuit does not "interrogat[e] the factual issues of whether the underlying criminal activity occurred." *Id*. at 302-03 (majority opinion).

Then there is the Fifth Circuit's decision in *Santillana v. Upton*, 846 F.3d 779 (5th Cir. 2017), which the petition discussed in some detail yet the Government inexplicably ignores. *See* Pet. 20-21. As in this case, an intervening decision of this Court made clear that the indictment and jury charge failed to

include an essential element of the offense. 846 F.3d at 781, 785. The Government nonetheless argued that the savings clause was unavailable because "the record contains evidence that could support a finding" of the missing element. *Id*. at 784. But the Fifth Circuit held 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." *Ibid*. And to do that, the Fifth Circuit looks exclusively at the "indictment and jury instructions," disregarding even the evidence presented *at trial*. *Ibid*. (refusing Government's invitation to look at evidence in trial record); *id*. at 785 (looking only at indictment and jury instructions); *ibid*. ("Based on the indictment and instruction, we cannot say that the jury found" the missing element).[1]

Accordingly, the Government cannot simply cite to a circuit's requirement of a conviction for a "nonexistent offense" and assume from that the circuit would reject a savings clause petition in this case. BIO 9. Indeed, the opposition fails to cite even a single decision from any circuit rejecting a savings clause claim on the basis of evidence that was never presented to the jury. *See ibid.* (citing *Alaimalo v. United States*, 645 F.3d 1042, 1047-48 (9th Cir. 2011)

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[1] In *Hammoud v. Ma'at*, 830 Fed. Appx. 438 (5th Cir. 2020) (per curiam), a panel of the Fifth Circuit refused to extend savings-clause relief to cases in which an intervening statutory amendment, claimed to be "clarifying," allegedly rendered the defendant convicted of a non-existent offense. As Amici note, the Fifth Circuit recently granted rehearing en banc in that case to consider its precedent in this area. Amicus Br. 5. But there is no indication it will reconsider its views on the scope of the relevant evidence.

(not addressing issue) and *Triestman v. United States*, 124 F.3d 361, 365 n.2, 379 (2d Cir. 1997) (same, explaining savings clause does not require determination "whether [the petitioner] is actually innocent")).

II. The Government's Other Vehicle Objections Are No Impediment To Review.

The Government's only other objection is that petitioner will lose his habeas case on the merits. BIO 10. That is no basis to deny certiorari either.

The Government does not argue that its merits arguments would prevent the Court from reaching the question presented. And as the petition explained, this Court regularly grants certiorari to resolve circuit conflicts regarding similar threshold issues despite the Government's objection that the petitioner might ultimately lose on other grounds. Pet. 22. That is what happened in *Rehaif* itself. *See Rehaif* BIO 12-13 (arguing case poor vehicle because defendant had "no 'viable defense' that he lacked the [required] mens rea"); *Rehaif*, 139 S. Ct. at 2220 (resolving question presented and remanding for harmless error analysis). And it is particularly common in cases like this, addressing the prerequisites for considering collateral attacks on criminal sentences. *See, e.g.*, *Trevino v. Thaler*, 569 U.S. 413, 429 (2013); *Martinez v. Ryan*, 566 U.S. 1, 17-18 (2012); *Maples v. Thomas*, 565 U.S. 266, 290 (2012); *Edwards v. Carpenter*, 529 U.S. 446, 453-54 (2000).

The Government provides no reason for a different approach here. But its merits arguments are unpersuasive in any event.

A. Petitioner's Claim Is Not Procedurally Defaulted.

The United States asserts that any habeas petition would be procedurally defaulted absent "a stringent showing of actual innocence." BIO 10 (citing *Bousley v. United States*, 523 U.S. 614, 623-24 (1998)). But that argument mischaracterizes procedural default doctrine, which requires petitioner to show *either* actual innocence *or* cause and prejudice. *See, e.g.*, *Dretke v. Haley*, 541 U.S. 386, 388 (2004).

In this case, petitioner could show cause and prejudice. Cause exists when this Court "overtur[ns] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Reed v. Ross*, 468 U.S. 1, 17 (1984) (citation omitted). *Rehaif* fits that description perfectly. *See Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting) (noting decision "overturn[ed] the long-established interpretation of an important criminal statute ..., an interpretation that ha[d] been adopted by every single Court of Appeals to address the question" and was "used in thousands of cases for more than 30 years"); *United States v. Cooper*, 2021 WL 328685, at *2 (D. Nev. Feb. 1, 2021) (finding cause for failure to raise *Rehaif* claim at trial under *Reed*), *appeal pending*, No. 21-15330 (9th Cir. docketed Feb. 24, 2021). And, as discussed next, petitioner could show prejudice as well.

B. Petitioner Could Show Prejudice.

The Government says that petitioner cannot show prejudice, and that any *Rehaif* error is harmless, because his presentence investigation report (PSR) supposedly makes clear petitioner knew his felon

status. BIO 10 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). That argument fails for three reasons.

First, the Government assumes that harmless error applies to petitioner's challenge to his indictment. But as the petition explained, that is an open question in this Court. Pet. 22-23; BIO 9-10 (ignoring the issue).

Second, even when the *Brecht* harmless error standard applies, it asks whether the error had a "substantial and injurious effect or influence *in determining the jury's verdict*." 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (emphasis added)). Here, petitioner could easily show that if the jury had been properly instructed, it would have been compelled to acquit him because the Government presented no evidence to satisfy the *Rehaif* mens rea element. *See* Pet. 5; BIO 3, 9-10 (not claiming otherwise).

The Government's only response is to point to the information in the PSR, which it never presented to the jury. BIO 10. But *Brecht* asks how the error affected the actual jury verdict, which is based on the evidence the Government actually presented at trial. *See, e.g.*, *United States v. Frady*, 456 U.S. 152, 169 (1982) (prejudice evaluated in the "context of the events at trial"). Recognizing this, the Tenth Circuit recently cast serious doubt on the Government's attempt to argue in another case that a *Rehaif* error was harmless because a PSR showed the defendant "must have known of his prohibited status." *United States v. Arthurs*, 823 Fed. Appx. 692, 696 n.7 (10th Cir. 2020). The court explained:

> We do not rely on this extra-trial evidence, though, because the error in this case is a trial error—i.e., an "error which occurred during the presentation of the case to the jury, and which *may therefore be quantitatively assessed in the context of other evidence presented* in order to determine whether its admission was harmless[.]"

Ibid. (quoting *Arizona v. Fulminate*, 499 U.S. 279, 307-08 (1991)) (emphasis altered). Because the Tenth Circuit was able to resolve the harmless error question based on the evidence presented to the jury, the court was not required "to resolve whether *Brecht*-harmless-error review lends itself to extra-trial evidence in this context" but noted that "a future panel may need to resolve whether courts in similar circumstances can look beyond the trial record." *Ibid*.

Because the Government's vehicle objection depends on the answer to a question unresolved by the circuit below, it cannot show that petitioner's habeas claim is so obviously dead in the water that it would be pointless to use this case to settle a completely distinct and obviously certworthy question.[2]

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[2] The Court's impending decision in *Greer v. United States*, No. 19-8709, may inform the question noted in *Arthurs*, but will not resolve it. The question in *Greer* is whether the Government may rely on a PSR to defeat a claim of plain error under Fed. R. Civ. P. 52(b). *Greer* Petr. Br. i, 35. But this Court has held that plain error does not apply in the habeas context; errors not raised at trial are instead evaluated under the distinct cause and prejudice test. *See Brecht*, 507 U.S. at 634 (citing *Frady*, 456 U.S. at 162-69). If necessary, this Court could use this case as a follow-on to *Greer* to decide whether its holding in that case extends to the cause-and-prejudice context.

Third, even if the court could consider the PSR evidence, that would not establish harmless error, as the Fourth Circuit recently held in *United States v. Green*, 973 F.3d 208 (4th Cir. 2020), *petition for cert. pending*, No. 20-1295 (filed Mar. 17, 2021).

In that case, as here, the Government argued that a *Rehaif* error was harmless because the defendant's PSR showed he had served "nearly a decade in prison" for prior felony convictions. 973 F.3d at 211. The Fourth Circuit accepted that it could rely on the PSR, but nonetheless held that the indictment's failure to allege the defendant's knowledge of his status "prejudiced [the defendant] because it failed to provide sufficient notice of the accusations against him." *Ibid*. In addition, the "failure to instruct the jury on the prohibit status element, and the government's failure to present sufficient evidence on this point at trial, prejudiced" the defendant as well. *Ibid*. The court then found that the combination of errors "were sufficient to undermine the confidence in the outcomes of the proceedings," and therefore ordered a new trial. *See ibid*.[3]

The Government surely disagrees with that analysis, but again, it cannot claim that petitioner's habeas petition is so clearly foreclosed that this is a poor vehicle for deciding whether he should even have a chance to litigate it.

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[3] *Green* relied on *United States v. Medley*, 972 F.3d 399 (4th Cir. 2020), which is now being reheard en banc, *see* 828 Fed. Appx. 923 (4th Cir. 2020).

C. Habeas Would Provide Petitioner Meaningful Relief.

Finally, to the extent the Government suggests this is a poor vehicle because habeas relief would do petitioner no good – because he would eventually be convicted again given the information in the PSR – that is incorrect as well. At the *very* least, even if reconvicted, petitioner would be sentenced under this Court's current interpretation of the Armed Career Criminal Act of 1984 (ACCA), reducing his sentence by nearly two-thirds and relieving him from what is now, as a practical matter, a life sentence.[4]

* * *

Of course, this Court does not grant certiorari to correct such case-specific injustices – it takes cases to resolve circuit conflicts. It should therefore make little difference whether the Government or petitioner is right about the practical consequences of a favorable decision on the question presented for this one particular litigant. At bottom, none of the Government's vehicle objections pose an impediment to using this case to resolve the long-standing,

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[4] Petitioner's 327-month sentence was premised on then-existing Eighth Circuit precedent holding that petitioner's prior second-degree burglary convictions constituted "violent felonies" under 18 U.S.C. § 924(e)(2)(B)(ii). *See* PSR ¶ 31; Order at 1-2, *United States v. Jackson*, No. 4:02-cr-00094-SRB-1 (W.D. Mo. Aug. 31, 2016), Doc. 185. After *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Eighth Circuit overturned that precedent and now acknowledges that Missouri's second-degree burglary does not constitute an ACCA predicate offense. *See United States v. Naylor*, 887 F.3d 397, 407 (8th Cir. 2018) (en banc). Absent the ACCA enhancement, petitioner's maximum sentence would have been 120 months. 18 U.S.C. § 924(a)(2).

untenable conflict now-Justice Barrett and her former circuit court colleagues have decried. Pet. 17-18. The petition should be granted.

CONCLUSION

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

Respectfully submitted,

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