No. 21-___

IN THE

Supreme Court of the United States

MICHAEL JACKSON,

Petitioner,

v.

WARDEN, USP-LEAVENWORTH,

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

Kevin K. Russell
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

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 a federal prisoner is entitled to bring a habeas claim under the saving clause of Section 2255(e) to challenge the unlawful application of a mandatory minimum sentence, and imposition of a sentence that exceeded the proper statutory maximum, when his challenge was previously precluded by binding circuit precedent that has since been overruled by the circuit sitting en banc on the basis of an intervening decision of this Court.

RELATED PROCEEDINGS

Proceedings directly on review:

Jackson v. Warden, USP-Leavenworth, No. 21-3011 (10th Cir. Aug. 13, 2021)

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

Other related proceedings:

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

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

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)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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-4a) and the order of the district court (Pet. App. 5a-11a) dismissing petitioner's Section 2241 petition for habeas corpus are not reported. They are available at 2021 WL 3598344 and 2020 WL 7024302, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2021. 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 testing the legality of his conviction and sentence in his initial Section 2255 petition by then-binding circuit precedent that was subsequently abrogated by this Court.

The Government has previously conceded that the question presented divides the circuits and warrants this Court's review. Indeed, three 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). *See United States v. Wheeler*, No. 18-420. 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 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 deciding the question. The petition should be granted.

STATEMENT OF THE CASE

1. In March 2002, petitioner Michael Jackson was 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). Petitioner was convicted on a single count of being a felon-in-possession in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). 365 F.3d at 651. He was sentenced as a career offender under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to 327 months' imprisonment. 365 F.3d at 651-53. The basis for the ACCA enhancement included petitioner's prior convictions for second-degree burglary in Missouri, which the district court deemed "violent felonies" within the meaning of the ACCA based on then-existing circuit precedent. *See* Order at 1-2, *Jackson v. United States*, No. 16-CV-557-W-DW (W.D. Mo. Aug. 31, 2016), Doc. 185 ("2016 Order"). His conviction and sentence were ultimately affirmed on appeal, and an initial petition for relief under 28 U.S.C. § 2255 was denied. Pet. App. 5a-6a.

2. The Eighth Circuit subsequently granted petitioner permission to file a successive Section 2255 petition to challenge his conviction under this Court's intervening constitutional decision in *Johnson v. United States*, 576 U.S. 591 (2015). *See* Judgment, *Jackson v. United States*, No. 15-3472 (8th Cir. May 3, 2016).

The district court denied that petition on the ground that while *Johnson* invalidated the residual clause of the ACCA's definition of "violent felony," the definition also included individual enumerated offenses that qualify as violent felonies, including "burglary." *See* 2016 Order at 2. Again relying on then-existing circuit precedent, the court held that petitioner's Missouri second-degree burglary convictions qualified as "burglary" under the ACCA provision. *Ibid*. The Eighth Circuit denied a certificate of appealability. Judgment, *Jackson v. United States*, No. 17-1037 (8th Cir. June 1, 2017).

3. The Eighth Circuit subsequently reversed course and held that second-degree burglary in Missouri is *not* a "violent felony" under the ACCA, based on an intervening decision of this Court interpreting the federal statute. *See United States v. Naylor*, 887 F.3d 397, 407 (8th Cir. 2018) (en banc) (relying on *Mathis v. United States*, 136 S. Ct. 2243 (2016)). Petitioner filed his present pro se habeas petition under 28 U.S.C. § 2241, seeking to challenge his ACCA conviction in light of that intervening precedent.[1] Pet. App. 5a.

---

[1] Petitioner filed his petition in the Tenth Circuit because he is now held in the Leavenworth federal penitentiary in Kansas. *See* Pet. App. 5a.

The district court held that it lacked authority to entertain the petition. Pet. App. 5a. It explained that ordinarily, an inmate may challenge his conviction and sentence only through a 2255 petition. *Id.* at 6a-7a. But that avenue was not available to petitioner because successive 2255 petitions are allowed only for intervening *constitutional* decisions and petitioner was relying on cases changing the interpretation of the ACCA. *Id.* at 7a-8a.

The district court acknowledged, however, that 28 U.S.C. § 2255(e) provides a "savings clause" that allows habeas petitions under Section 2241 when the ordinary Section 2255 remedy is "inadequate or ineffective to test the legality of [a prisoner's] detention." Pet. App. 7a (quoting 28 U.S.C. § 2255(e)). But it held that settled circuit precedent precludes use of the savings clause here. *Id.* at 8a-11a.

4. The Tenth Circuit affirmed. Pet. App. 1a-4a. It acknowledged that petitioner was convicted as an ACCA violent felon "based on existing precedent" that this Court subsequently vacated and the Eighth Circuit then abandoned. *Id.* at 2a. Given this, the panel did not question that petitioner is innocent of the ACCA offense for which he was subjected to a mandatory minimum sentence of 15 years, and given a 327-month sentence well above the 120-month statutory maximum that otherwise would have applied. *See ibid.*; 18 U.S.C. § 924(a)(2).

Nonetheless, the court of appeals held that petitioner had no avenue for seeking habeas relief from his unlawful conviction and sentence, given the Tenth Circuit's decision in *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011). Pet. App. 3a. In *Prost*, then-Judge Gorsuch, writing the majority decision for a

divided panel, rejected the majority circuit position that saving clause petitions under 28 U.S.C. § 2241 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).[2] Judge Seymour further observed that "[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

---

[2] 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).

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 "habeas relief under § 2241 is unavailable because Mr. Jackson had an earlier opportunity to seek a remedy under § 2255 for his challenge to the existence of three or more convictions for violent felonies," Pet. App. 4a, even though the courts were compelled to reject those claims under erroneous precedent since overruled by this Court, *id.* at 2a & n.1.

5. A few months before filing the habeas petition at issue in this appeal, petitioner had filed another pro se 2241 petition challenging his conviction in light of this Court's intervening decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Rehaif* had overruled prior circuit precedent governing the mens rea required for a felon-in-possession conviction, rendering petitioner's jury instructions erroneous. That 2241 petition met the same fate as the present one: the district court held, and the Tenth Circuit affirmed, that *Prost* precluded saving clause relief. *See Jackson v. Hudson*, 822 Fed. Appx. 821 (10th Cir. 2020), *cert. denied*, --- S. Ct. ----, 2021 WL 2405159 (2021).

Petitioner sought certiorari on essentially the same question presented by this petition. *See Jackson v. Hudson*, No. 20-911. The Government opposed the petition. It acknowledged that "the courts of appeals are divided on the availability of saving-clause relief for statutory claims." U.S. BIO at 8, *Jackson*, *supra*. And it admitted the question's "importance." *Ibid*. It nonetheless opposed the petition on two grounds. First, it observed that 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*." U.S. BIO at 8, *Jackson*, *supra*. Second, it argued that the petition was "an unsuitable vehicle in which to review th[e] conflict" because: (a) "petitioner would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable view of the saving clause," given that petitioner was only challenging his jury instructions, *id*. at 9; and (b) petitioner's "claim to relief under *Rehaif* lacks merit" because any instructional error was harmless, *id*. at 10. In light of that opposition, this Court denied the petition. 2021 WL 2405159.

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. 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." U.S. Pet. at 23, *United States v. Wheeler*, No. 18-420 (Oct. 3, 2018). Numerous courts of appeals and judges have also acknowledged this split.[3] Commentators have as well. *See, e.g.*, Brian R. Means, *Federal Habeas Manual* § 1:29, Westlaw (database updated May 2021) (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

---

[3] *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).

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. 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); *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).

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.

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 serving an unlawful sentence of imprisonment 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 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 v. Barnhart*, No. 19-1365 (Sept. 11, 2020) ("The circuit conflict therefore does not warrant this Court's review any more than it did before."); U.S. BIO at 8-9, *Jackson*, *supra* (same). 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 24,000 prisoners are housed in federal Bureau of Prisons and private facilities within the Tenth and Eleventh Circuits—roughly 14% of the federal prison population.[4]

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 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

---

[4] 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* Fed. Bureau of Prisons, *Population Statistics*, https://www.bop.gov/mobile/about/population_statistics.jsp#pop_totals (last updated Aug. 24, 2021).

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.

The Government successfully opposed petitioner's prior petition, arguing that it was "an unsuitable vehicle" because "petitioner would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable view of the savings clause." U.S. BIO at 9, *Jackson*, *supra*. But it can make no such claim in this case.

1. 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 satisfies both requirements. The court of appeals explained that at the time of petitioner's sentencing and initial 2255 petitions, binding Eighth Circuit precedent held second-degree burglary in Missouri qualified as generic "burglary" and,

therefore, a violent felony under the ACCA. Pet. App. 2a (citing *United States v. Sykes*, 844 F.3d 712, 716 (8th Cir. 2016), *vacated*, 138 S. Ct. 1544 (2018)).

In addition, the intervening decisions of this Court in *Mathis* and the Eighth Circuit in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc), establish that petitioner "has received an erroneous statutory minimum sentence" and was "sentenced in excess of an applicable maximum under a statute." U.S. BIO at 19, *Hueso*, *supra*. The court of appeals explained that petitioner was classified as a violent felon on the basis of his "six prior convictions for second-degree burglary and one prior conviction for first-degree burglary" in Missouri. Pet. App. 2a. The court further acknowledged that if the second-degree convictions did not constitute violent felonies under the ACCA, "the sentencing court had no obligation to impose the 15-year mandatory minimum." *Ibid.*; *see also* 18 U.S.C. § 924(e) (ACCA requires three prior violent felony convictions). The court also did not dispute that absent his ACCA classification, petitioner's maximum sentence would have been 120 months, a decade-and-a-half less than his actual sentence. *See* Pet. App. 2a; 18 U.S.C. § 924(a)(2). Finally, as the Eighth Circuit sitting en banc explained, after *Mathis*, "convictions for second-degree burglary under Mo. Rev. Stat. § 569.170 (1979) do not qualify as violent felonies under the ACCA." *Naylor*, 887 F.3d at 407.

In these circumstances, petitioner would have been allowed to proceed with a saving clause petition in at least the Fourth, Seventh, and Ninth Circuits, while being barred in the Tenth and Eleventh Circuit. *Compare Wheeler*, 886 F.3d at 426-32, *Chazen*, 938

F.3d at 855-63, *and Allen v. Ives*, 950 F.3d 1184, 1190-91 (9th Cir. 2020), *with* Pet. App. 3a-4a, *and McCarthan*, 851 F.3d at 1080.

In fact, this case poses the saving-clause question in the same factual context as the Government's own petition in *Wheeler*. There, as here, the prisoner was sentenced to a statutory minimum sentence based on a classification of prior convictions that was consistent with then-circuit precedent that was subsequently overruled by the Fourth Circuit sitting en banc on the authority of an intervening decision of this Court. *See* U.S. Pet. at 2-12, *Wheeler*, *supra*.[5] The Government argued that this fact-pattern squarely implicated the circuit conflict, making the case "an opportune vehicle for resolving the conflict." *Id*. at 26.

This is an even better vehicle than *Wheeler* because in addition to being subjected to an inapplicable statutory *minimum*, petitioner also "has been sentenced in excess of an applicable *maximum* under a statute or under a mandatory sentencing guidelines regime." U.S. BIO at 19 *Hueso*, *supra* (emphasis added). As the Government explained in *Wheeler*, challenges to sentences exceeding the statutory maximum are cognizable in at least the Sixth and Seventh Circuits. *See* U.S. Pet. at 24, *Wheeler*, *supra* (citing *Brown v. Rios*, 696 F.3d 638, 640-41 (7th Cir. 2012); *Hill v. Masters*, 836 F.3d 591, 595-96, 598-600 (6th Cir. 2016)).

---

[5] In *Wheeler*, the defendant was subject to a mandatory minimum sentence because he had a prior conviction for a "felony drug offense." U.S. Pet. at 3-4, *Wheeler*, *supra* (citing 21 U.S.C. § 841(b)(1)(A)(iii) (2006)).

Moreover, when proof of an element (here, three or more prior violent felony convictions) increases a maximum permissible sentence, a new offense is established (here, being an armed career criminal in possession of a weapon). *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Accordingly, petitioner is also properly viewed as claiming actual innocence of his offense of conviction, a third ground for saving clause relief.

2. Of course, being entitled to *seek* relief under the saving clause does not mean that a prisoner will ultimately prove *entitlement to relief* on the merits of his habeas claim—petitioner is not aware of any circuit in which qualifying to file a saving clause petition automatically entitles the prisoner to habeas relief. Accordingly, although it is difficult to see how, it is at least theoretically possible the Tenth Circuit would conclude—contrary to the Eighth Circuit's decision in *Naylor* and the plain import of this Court's decision in *Mathis*—that petitioner's second-degree burglary convictions *do* constitute violent felonies under the ACCA. *But see, e.g.*, *United States v. Lozado*, 968 F.3d 1145, 1154 (10th Cir. 2020) (finding second-degree burglary in Colorado is not a violent felony under *Mathis*); *United States v. Hamilton*, 889 F.3d 688, 692-93 (10th Cir. 2018) (same for second-degree burglary in Oklahoma).[6] But that is not an

[6] Twenty-seven years ago, before *Mathis* and *Naylor*, a Tenth Circuit decision included dicta summarily embracing an Eighth Circuit decision's equally cursory conclusion that second-degree burglary under the relevant version of Missouri's statute was a violent felony. *See United States v. Phelps*, 17 F.3d 1334, 1341 (10th Cir. 1994) (citing *United States v. Whitfield*, 907 F.2d

obstacle to this Court resolving the threshold standard for when a prisoner is entitled to ask for an adjudication of the merits of his claims through a saving-clause petition.

Indeed, the United States argued in *Wheeler* that "[a]ny potential for the judgment below to ultimately be reinstated on other grounds, which would normally be a factor weighing heavily against certiorari, should not be the overriding factor here." U.S. Pet. at 29, *Wheeler*, *supra*. "Given the need for timely resolution of the issue," the Solicitor General wrote in 2018, "the Court should grant certiorari in this case and address it now." *Ibid*. The Government should not be heard to argue otherwise now.

III. The Tenth Circuit's Decision Is Wrong.

The Government's position on the question presented has vacillated over the years.[7] 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

---

798 (8th Cir. 1990)). As the Eighth Circuit has since recognized, the analysis in those decisions did not survive *Mathis*. Nor has the Tenth Circuit had occasion since *Mathis* to revisit the question, perhaps because in cases within the circuit, the Government has "concede[d] that . . . prior convictions for second degree burglary under Missouri law no longer qualify as predicate crimes of violence." Government's Response to Def.'s Mot. to Vacate Sentence, *United States v. Bronson*, No. 88-200075-01-WL, 2017 WL 10664055 (D. Kan. 2017) (footnote omitted); *see also Lozado*, 968 F.3d at 1154 (Government conceded same for Colorado statute).

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

Section 2255(e),"[8] that was "refuted by Section 2255(e)'s text, when read as a whole."[9] The Government even went so far as to support the petition for rehearing en banc in *Prost*.[10] The United States then switched positions, leading to the petition in *Wheeler*. Most recently, in opposing petitioner's prior petition, the Government conspicuously failed to defend the Tenth Circuit's rule. *Compare* U.S. BIO at 7-10, *Jackson*, *supra*, *with, e.g.*, U.S. BIO at 10-17, *Hueso*, *supra.* Whatever the Government's current position, its flip-flopping on the question presented reinforces the need for the Court's review.

Even if the Court thought that the Tenth Circuit's interpretation were the correct one, that would be a very substantial reason to grant certiorari. On that view, fully nine of the circuits—home to the vast majority of federal inmates—are "render[ing] AEDPA's[11] 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

---

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

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

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

[11] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214.

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). The idea that a 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." *Prost*, 636 F.3d at 606 (Seymour, J., concurring in part and dissenting in part).

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.[12] It is

[12] As a result, rehearing or certiorari is granted in a vanishingly small percentage of cases. "For example, looking at

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 Tenth Circuit 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."[13] 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

---

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).

[13] *See Inadequate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/inadequate (last visited Aug. 25, 2021); *Ineffective*, Merriam-Webster, https://www.merriam-webster.com/dictionary/ineffective (last visited Aug. 25, 2021).

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 "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 more recent 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;[14] and (c) there was no need to provide for successive 2255 petitions for changes based 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

---

[14] *See, e.g.*, *Santillana v. Upton*, 846 F.3d 779, 782 (5th Cir. 2017) (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).

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,

Kevin K. Russell
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
kr@goldsteinrussell.com

August 31, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-3011

Michael Jackson,
Petitioner-Appellant,

v.

Warden, USP-Leavenworth,
Respondent-Appellee.

D.C. No. 5:20-CV-03292-JWL (D. Kan.)

Filed August 13, 2021

ORDER AND JUDGMENT*

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

---

* We conclude that oral argument would not materially help us to decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Mr. Michael Jackson was convicted of unlawfully possessing a firearm after a felony conviction. *See* 18 U.S.C. § 922(g)(1). For sentencing, a 15-year minimum prison term would be mandatory if Mr. Jackson had at least three prior convictions for violent felonies. 18 U.S.C. § 924(e)(1). A felony could be considered violent if it fell within a list of particular crimes or qualified under the so-called "residual clause." 18 U.S.C. § 924(e)(2)(B).

In Missouri, Mr. Jackson had six prior convictions for second-degree burglary and one prior conviction for first-degree burglary. So the court had to consider whether the burglary convictions involved violent felonies. The court answered "yes" based on existing precedent (*United States v. Sykes*, 844 F.3d 712, 716 (8th Cir. 2016))[1] and applied the 15-year minimum prison sentence.

After the sentencing, however, the applicable precedent changed. *See United States v. Naylor*, 887 F.3d 397, 406–07 (8th Cir. 2018) (en banc). Relying on this change in the law, Mr. Jackson argues that the sentencing court shouldn't have considered second-degree burglary a violent felony. If he's right, the sentencing court had no obligation to impose the 15-year mandatory minimum.

Mr. Jackson thus sought habeas relief under 28 U.S.C. § 2241. The federal district court denied habeas relief, reasoning that Mr. Jackson's sole remedy lay in

---

[1] After Mr. Jackson was convicted of unlawfully possessing a firearm, the Supreme Court vacated that precedent. *See United States v. Sykes*, 138 S. Ct. 1544 (2018).

a motion to vacate the sentence under 28 U.S.C. § 2255. We affirm.

Mr. Jackson has previously filed a motion to vacate under § 2255, arguing that "[h]e cannot file a second or successive Section 2255 petition because he is not claiming newly discovered evidence or relying on an intervening constitutional decision." Appellant's Opening Br. at 6; *see* 28 U.S.C. § 2255(h). He is instead relying on the change in precedent as a basis to pursue habeas relief under 28 U.S.C § 2241. But he can pursue habeas relief under § 2241 only if a remedy under § 2255 "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

Section 2255 is not "inadequate or ineffective" simply because contrary precedent existed when Mr. Jackson made his initial motion. *Abernathy v. Wandes*, 713 F.3d 538, 547–48 (10th Cir. 2013). To the contrary, § 2255 would be inadequate or ineffective only if Mr. Jackson never had an opportunity to raise the issue in a challenge to the conviction or sentence. *Prost v. Anderson*, 636 F.3d 578, 584–85 (10th Cir. 2011); *see also Cleaver v. Maye*, 773 F.3d 230, 233 (10th Cir. 2014) (upholding the denial of habeas relief because the petitioner could not show that he had lacked the opportunity to present the issue in the § 2255 proceedings).

Mr. Jackson concedes that "Tenth Circuit precedent holds that Section 2255 is not 'inadequate or ineffective' when an inmate would have been *allowed* to file a challenge to his conviction or sentence, even if that claim was bound to be rejected on the basis of on-point, binding circuit precedent at the time, and even if that precedent is subsequently overturned as erroneous." Appellant's Opening Br. at

6–7 (emphasis in original). Recognizing this precedent, Mr. Jackson seeks only an opportunity to challenge it. But he recognizes, as we do, that one panel cannot overrule another panel. *United States v. White*, 782 F.3d 1118, 1126–27 (10th Cir. 2015).

We thus apply our existing precedent, concluding that habeas relief under § 2241 is unavailable because Mr. Jackson had an earlier opportunity to seek a remedy under § 2255 for his challenge to the existence of three or more convictions for violent felonies. Given this conclusion, we affirm the denial of habeas relief.

Entered for the Court

Robert E. Bacharach
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 20-3292-JWL

Michael Jackson,
Petitioner,

v.

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, proceeds pro se. The court has screened the petition under Rule 4 of the Rules Governing Habeas Corpus Cases, foll. 28 U.S.C. § 2254 and dismisses this matter without prejudice for lack of statutory jurisdiction.

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 then unsuccessfully sought relief under 28 U.S.C. § 2255, and he has been denied authorization to file a second motion under that section.

Petitioner brings this action under § 2241 challenging his classification as an armed career offender.

Analysis

The court first considers whether § 2241 is the proper remedy for petitioner to challenge his conviction. Because "that issue impacts the court's statutory jurisdiction, it is a threshold matter." *Sandlain v. English*, 2017 WL 4479370 (10th Cir. Oct. 5, 2017) (unpublished) (finding that whether *Mathis v. United States*, 136 S. Ct. 2243 (2016), is retroactive goes to the merits and that the court must first determine whether § 2241 is the proper remedy to present the claim) (citing *Abernathy v. Wandes*, 713 F.3d 538, 557 (10th Cir. 2013)).

A federal prisoner seeking relief from an allegedly invalid conviction or sentence may file a motion under § 2255 to "vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). Such a motion must be filed in the district where the movant was convicted. *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010). Generally, this remedy 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" of § 2255(e), a federal prisoner may file a petition under 28 U.S.C. § 2241 if the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e).

Petitioner relies on the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), in which the Supreme Court held that the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. *Davis*, 139 S. Ct. 2319, 2324 (2019). Section 924(c)(3)(B) increased the prison sentence for a person who uses a firearm in connection with a federal "crime of violence" ... "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." He claims that his Missouri state burglary convictions were improperly characterized as crimes of violence and that his status as a career offender must be set aside. Petitioner also cites *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc) which interpreted Missouri's second-degree-burglary statute.

When a prisoner is denied relief in a motion brought under 28 U.S.C. § 2255, he cannot pursue a second motion under that section unless he can demonstrate either that there is "newly discovered evidence" or "a new rule of constitutional law" as 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)). The fact that a prisoner is precluded from bringing a second motion under § 2255 does not establish that the remedy under that section is inadequate or ineffective.

Rather, changes in the law were anticipated by Congress and provide grounds for successive requests for collateral review only under the conditions set out in § 2255(h).

The Tenth Circuit has rejected the claim that a "current inability to assert the claims in a successive § 2255 motion – due to the one-year limitation period and the restrictions identified in § 2255(h) – demonstrates that the remedy under § 2255 is inadequate or ineffective." *Jones v. Goetz*, No. 17-1256, 2017 WL 4534760, at *5 (10th Cir. 2017) (unpublished) (citations omitted); *see also Brown v. Berkebile*, 572 F. App'x 605, 608 (10th Cir. 2014) (unpublished) (holding that even if a petitioner is barred from bringing a second motion under § 2255(h), that would "not establish the remedy in § 2255 is inadequate.") (citing *Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999) and *Prost*, 636 F.3d at 586). If § 2255 could be found "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, id.*; *see also Hale*, 829 F.3d at 1174 ("Because Mr. Hale cannot satisfy § 2255(h), he cannot, under *Prost*, satisfy § 2255(e), and § 2241 review must be denied.").

The Tenth Circuit has stated that the Antiterrorism and Effective Death Penalty Act (AEDPA), which modified § 2255, "did not provide a remedy for second or successive § 2255 motions based on intervening judicial interpretations of statutes." *Abernathy*, 713 F.3d at 547 (10th Cir. 2013). Under the savings clause of § 2255(e), a prisoner may be able to proceed under §2241, but § 2255 has been held to be

"inadequate or ineffective" in only "extremely limited circumstances." *Id*. (citations omitted).

An applicant does not meet this standard "simply by asserting his ability to file a § 2255 motion is barred by timing or filing restrictions." *Crawford v. United States*, 650 F. App'x 573, 575 (10th Cir. 2016) (unpublished) (citing *Sines*, 609 F.3d at 1073).

The Tenth Circuit has held that "it 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 process that itself is inadequate or ineffective for testing a challenge to detention." *Prost*, 636 F.3d at 589 (stating that "the fact that Mr. Prost or his counsel may not have thought of a *Santos*-type argument earlier doesn't speak to the relevant question of whether § 2255 itself provided him with an adequate and effective remedial mechanism for testing such an argument.").

"The savings clause doesn't guarantee results, only process," and "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 (whether it be 28 U.S.C. §§ 1331, 1332, 2201, 2255, or otherwise) an inadequate of ineffective *remedial vehicle* for *testing* its merits within the plain meaning of the savings clause." *Id*. (emphasis in original).

This court is bound by Tenth Circuit precedent which addresses the question of "whether a new Supreme Court decision interpreting a statute that may undo a prisoner's conviction renders the prisoner's initial § 2255 motion 'inadequate or

ineffective.'" *Haskell*, 510 F. App'x at 744. In *Prost*, the Tenth Circuit held that it cannot, stating that if "a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion[,] … then the petitioner may not resort to … § 2241." *Prost*, 636 F.3d at 584.

The fact that the *Davis* decision was not in existence at the time of petitioner's motion under § 2255 does not provide grounds for him to proceed under § 2241. The Tenth Circuit has held that although a petitioner may benefit from a Supreme Court opinion announced after his § 2255 motion, it is not reason enough to show the original remedy under § 2255 was "inadequate or ineffective." *See Prost*, 636 F.3d at 589; *Sandlain*, 2017 WL 4479370, at *3 ("Nor does it matter that *Mathis* was not in existence at the time he filed his initial § 2255 motion.").

The *Prost* decision also found that § 2255 is not "inadequate or ineffective" simply because adverse precedent existed in the governing circuit at the time of the motion under § 2255. *Abernathy*, 713 F.3d at 548 (citing *Prost*, 636 F.3d at 590-93); *Sandlain*, *id*., ("[E]ven assuming there was contrary circuit precedent, nothing prevented him from raising the argument in his initial § 2255 motion and then challenging any contrary precedent via en banc or certiorari review."); *Lewis v. English*, 736 F. App'x 749, 752 (10th Cir. June 5, 2018) (unpublished) (stating that anticipating *Mathis* and presenting it in the face of contrary circuit precedent would be an "uphill battle", but would have afforded the petitioner "the opportunity to take this path").

In *Abernathy*, the Tenth Circuit stated that although other circuits "have adopted somewhat

disparate savings clause tests, most requir[ing] a showing of 'actual innocence' before a petitioner can proceed under § 2241 …. Under the *Prost* framework, a showing of actual innocence is irrelevant." *Abernathy*, 713 F.3d at n. 7 (citations omitted).

The petitioner has the burden to show that the remedy under § 2255 is inadequate or ineffective. *Hale*, 829 F.3d at 1179. Petitioner cannot meet the burden under governing case law. The Court concludes the savings clause of § 2255(e) does not apply and therefore, the Court lacks statutory jurisdiction in this matter.

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

IT IS SO ORDERED.

DATED: This 30th day of November, 2020, at Kansas City, Kansas.

S/ John W. Lungstrum

JOHN W. LUNGSTRUM
U.S. Senior District Judge