No. 21-857

In the Supreme Court of the United States

MARCUS DEANGELO JONES, PETITIONER

v.

DEWAYNE HENDRIX, WARDEN

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner may 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 rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under Section 2255(e), a petition 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." 28 U.S.C. 2255(e).

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).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. *Jones*, No. 99-cr-4041 (July 26, 2000)

United States Court of Appeals (8th Cir.):

United States v. *Jones*, No. 00-2905 (June 25, 2001)

Jones v. *United States*, No. 03-1756 (July 24, 2003)

Jones v. *United States*, No. 04-1002 (Mar. 24, 2004)

United States v. *Jones*, No. 05-3531 (Nov. 9, 2005)

Jones v. *United States*, No. 05-3992 (Nov. 25, 2005)

United States v. *Jones*, No. 05-3826 (Dec. 23, 2005)

Jones v. *United States*, No. 06-3117 (Nov. 7, 2006)

Jones v. *United States*, No. 07-2802 (Aug. 8, 2007)

United States v. *Jones*, No. 07-3229 (Jan. 8, 2009)

Jones v. *United States*, No. 09-1547 (Apr. 2, 2009)

United States v. *Jones*, No. 09-2418 (June 26, 2009)

United States v. *Jones*, No. 10-1389 (June 2, 2010)

United States v. *Jones*, No. 10-3657 (Jan. 13, 2011)

United States v. *Jones*, No. 11-2317 (July 18, 2011)

United States v. *Jones*, No. 11-3367 (Nov. 22, 2011)

United States v. *Jones*, No. 12-1489 (Mar. 12, 2012)

United States v. *Jones*, No. 12-2254 (July 5, 2012)

Jones v. *United States*, Nos. 16-1249 & 16-1250 (Apr. 5, 2016)

United States v. *Jones*, Nos. 16-1105 & 16-1106 (Apr. 8, 2016)

Jones v. *United States*, No. 17-3024 (Feb. 6, 2018)

United States v. *Jones*, No. 18-1712 (May 21, 2018)

Jones v. *United States*, No. 19-1662 (May 1, 2019)

In re Jones, No. 20-1335 (Mar. 5, 2020)

United States Supreme Court:

Jones v. *United States*, No. 03-8134 (Feb. 23, 2004)

Jones v. *United States*, No. 05-10618 (May 30, 2006)

Jones v. *United States*, No. 06-5064 (Oct. 2, 2006)

Jones v. *United States*, No. 07-6047 (Oct. 1, 2007)

Jones v. *United States*, No. 08-7164 (Dec. 8, 2008)

Jones v. *United States*, No. 08-9620 (May 4, 2009)

Jones v. *United States*, No. 10-6589 (Oct. 18, 2010)

Jones v. *United States*, No. 11-5113 (Nov. 7, 2011)

Jones v. *United States*, No. 11-10304 (June 11, 2012)

Jones v. *Federal Bureau of Prisons*, No. 12-5637 (Jan. 7, 2013)

Jones v. *Castillo*, No. 12-6925 (Mar. 25, 2013)

Jones v. *United States*, No. 12-10400 (June 24, 2013)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 8 F.4th 683. The opinion of the district court (Pet. App. 14a-29a) is not published in the Federal Supplement but is available at 2020 WL 10669427.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2021. On October 29, 2021, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including December 9, 2021. The petition for a writ of certiorari was filed on December 7, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner

was convicted on two counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1), and one count of making false statements to acquire a firearm, in violation of 18 U.S.C. 922(a)(6). See Pet. App. 2a. He was sentenced to 327 months of imprisonment, to be followed by five years of supervised release. See *id.* at 15a; 2018 WL 2303783, at *1 (D. Kan. May 21, 2018). The court of appeals affirmed. 266 F.3d 804 (8th Cir. 2001).

In 2002, petitioner filed a motion under 28 U.S.C 2255 to vacate, correct, or set aside his sentence. The district court denied the motion, but the court of appeals reversed and remanded with instructions to vacate one of petitioner's convictions for violating 18 U.S.C. 922(g)(1). 403 F.3d 604 (8th Cir. 2005). On remand, the district court vacated the conviction and the corresponding special assessment but otherwise left petitioner's sentence unchanged, and the court of appeals affirmed. 185 Fed. Appx. 541 (8th Cir. 2006) (per curiam), cert. denied, 549 U.S. 1273 (2007). Over the next decade, petitioner filed various unsuccessful postconviction claims in multiple federal courts. See Pet. App. 3a, 16a-17a; see also 2018 WL 2303783, at *1-*2.

In 2019, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Arkansas, the district where he was then confined. The court dismissed the petition. Pet. App. 14a-29a. The court of appeals affirmed. *Id.* at 1a-13a.

1. On August 18, 1999, petitioner purchased a semiautomatic handgun from a pawnshop in Missouri. 266 F.3d at 808-809. At the time, petitioner had an extensive criminal history. See Presentence Investigation Report (PSR) ¶¶ 28-59. Among other things, petitioner had been

convicted of five felonies and had served a prison sentence of a year or longer on at least one occasion. 266 F.3d at 808, 810; cf. PSR ¶¶ 32, 33, 34, 36. As petitioner later admitted, at the time of the firearm purchase, he knew he had been convicted of a felony and was not allowed to possess a gun. 266 F.3d at 808, 810. But when petitioner filled out the federal Form 4473 that he was required to complete when he purchased the firearm, he answered "no" to the question asking whether he had ever been convicted in any court of a crime for which a judge could have imprisoned him for more than a year. *Id.* at 808.

Later that day, police stopped petitioner's car for running a stop sign. 266 F.3d at 809. Petitioner told the police that he had a gun in the car; the police secured the weapon, but returned it to petitioner after examining the paperwork from the sale and confirming that the gun was not stolen. *Ibid.* Still later that same day, petitioner told an undercover police officer about the traffic stop and the gun while selling drugs to her. *Ibid.* Petitioner also possessed the gun (and discharged it) during a shootout on October 9, 1999. *Ibid.* According to petitioner, someone shot at him in his car, and he fired a round into the air before the gun jammed. *Ibid.* Petitioner was not arrested at the time, but the police retained the firearm. *Id.* at 809 & n.4.

In December 1999, petitioner was arrested after again selling drugs to an undercover officer. 266 F.3d at 808. A grand jury returned an indictment charging petitioner on two counts of possessing a firearm following a felony conviction (relating to the events of August 18 and October 9, 1999), in violation of 18 U.S.C. 922(g)(1), and one count of making false statements to acquire a firearm, in violation of 18 U.S.C. 922(a)(6). See

266 F.3d at 808; 403 F.3d at 606. Petitioner was convicted on all counts after a jury trial. See Pet. App. 15a.

A conviction for violating Section 922(g)(1) carries a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, a defendant has at least three prior convictions "for a violent felony or a serious drug offense" committed on different occasions, the Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, Ch. XVIII, 98 Stat. 2185, specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The Probation Office's presentence report determined that because of petitioner's prior felony convictions, he was subject to sentencing under the ACCA. PSR ¶ 25.

The district court sentenced petitioner to a total of 327 months of imprisonment, consisting of concurrent sentences of 327 months on each of the felon-in-possession counts and 60 months on the false-statement count. See Pet. App. 15a. The court of appeals affirmed. 266 F.3d at 816. In a separate case, petitioner was charged with drug-trafficking offenses arising from his transactions with the undercover officer, and he was sentenced to 327 months of imprisonment in that case as well. See *United States* v. *Jones*, 275 F.3d 673, 678 (8th Cir. 2001).

2. Petitioner filed a motion under 28 U.S.C 2255 to vacate, correct, or set aside his sentence. After the district court denied the motion, the court of appeals granted a certificate of appealability on one issue: whether petitioner received ineffective assistance of counsel because his lawyer did not challenge the indictment charging two Section 922(g) violations as multiplicitous. See 403 F.3d at 605. The court of appeals concluded that the indictment had in fact been multiplicitous and that peti-

tioner's counsel had performed deficiently in failing to raise that claim, and remanded with instructions to "vacate one of [petitioner's] felon-in-possession convictions and refund any associated special assessment fees that may have been paid." *Id.* at 607. On remand, the district court vacated one of petitioner's Section 922(g) convictions and eliminated the corresponding special assessment, but declined to conduct a new sentencing hearing. The court of appeals affirmed. 185 Fed. Appx. at 542-543.

Petitioner subsequently "flooded the federal dockets with unsuccessful postconviction challenges, including numerous § 2255 motions and repeated petitions to the Supreme Court for review." Pet. App. 3a; see Pet. II-V (listing some cases); pp. II-III, *supra* (listing others). In 2019, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Arkansas, the district where he was then confined, claiming 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). 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." *Id.* at 2194. Petitioner asserted that he was "'actually innocent' of his conviction for being a 'felon in possession of a firearm'" in light of *Rehaif*. Pet. App. 17a.

3. The district court dismissed the habeas petition for lack of jurisdiction. Pet. App. 14a-29a. The court determined that the petition was not authorized by 28 U.S.C. 2255(e), which provides that 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 [under Section 2255] is inadequate or ineffective to test the legality of his detention." See Pet. App. 18a-19a. The court reasoned that Section 2255(e)'s "saving clause" does not allow for a habeas petition based on a statutory claim because Section 2255(h) "provides only two narrow grounds to support a federal prisoner's claim that he should be allowed to pursue a 'second or successive' § 2255 motion: (1) 'newly discovered evidence' sufficient to prove actual innocence; or (2) 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *Id.* at 26a-27a (quoting 28 U.S.C. 2255(h)).

The district court acknowledged that "[f]ederal circuit courts of appeal are split on whether a new statutory interpretation by the Supreme Court can be effectively elevated to a 'third exception' to go along with the two congressionally created exceptions contained in § 2255(h)." Pet. App. 22a. And the court observed that "the Eighth Circuit has not yet directly spoken on this issue." *Id.* at 28a. But the court viewed Tenth and Eleventh Circuit decisions precluding statutory claims under the saving clause as "compelling and consistent with prior Eighth Circuit case law," which in the court's view "strongly suggest[ed] that [the Eighth Circuit] will follow the reasoning of the Tenth and Eleventh Circuits." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-13a. The court agreed that it "ha[d] yet to weigh[] in" on the issue, and stated that after "[r]eviewing the statutory text and our precedent, we agree with the Tenth and

Eleventh Circuits." *Id.* at 6a. The court reasoned that Section 2255 was not inadequate or ineffective to test the legality of petitioner's detention because he "could have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion." *Ibid.* The court further reasoned that even if petitioner's argument was contrary to then-existing circuit precedent, "the question is whether [petitioner] could have raised the argument, not whether he would have succeeded." *Id.* at 7a; see *id.* at 6a-10a. And the court rejected petitioner's argument that the Suspension Clause required that his claim be cognizable in this posture. See *id.* at 10a-13a.

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 writs of certiorari seeking review of the circuit conflict on the scope of the saving clause. *E.g.*, *Lewis* v. *Hendrix*, 142 S. Ct. 126 (2021) (No. 20-7863); *Peterson* v. *Butler*, 142 S. Ct. 125 (2021) (No. 20-7761); *Jackson* v. *Hudson*, 141 S. Ct. 2753 (2021) (No. 20-911); *Davis* v. *Quay*, 141 S. Ct. 1658 (2021) (No. 20-6448); *Williams* v. *Coakley*, 141 S. Ct. 908 (2020) (No. 20-5172); *Cray* v. *Warden, FCI Coleman*, 141 S. Ct. 908 (2020) (No. 20-5132); *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' opinion in this case does not appreciably deepen that conflict, and petitioner's *Rehaif* claim would not prevail in any circuit. Further review is unwarranted.

1. As explained on pages 9 to 12 of the government's brief in opposition in *Ham* v. *Breckon*, No. 21-763 (filed Feb. 24, 2022), 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. In addition to the court below, 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-10a; *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1086 (11th Cir.) (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, the other nine regional courts of appeals would permit such relief in some circumstances. See Br. in Opp. at 10-11, *Ham* v. *Breckon*, *supra* (No. 21-763).*

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* Petitioner suggests (Pet. 10 n.1) that the D.C. Circuit has "not address[ed] this issue" because its decision in *In re Smith*, 285 F.3d 6 (2002), simply "describ[ed] the Seventh Circuit's view of the [saving clause], not its own." But in addition to describing the Seventh Circuit's position, *Smith* went on to conclude that "Smith is actually innocent, having been convicted on the basis of an incorrect understanding of § 924(c), and § 2255 relief is unavailable to him. Smith may therefore file a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the district in which he is confined." 285 F.3d at 8 (paragraph break omitted). To the extent that those statements could be treated as dicta, petitioner identifies no D.C. Circuit decision that has done so.

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.*, *Lewis* v. *Hendrix*, *supra* (No. 20-7863); *Peterson* v. *Butler*, *supra* (No. 20-7761); *Jackson* v. *Hudson*, *supra* (No. 20-911); *Davis* v. *Quay*, *supra* (No. 20-6448); *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). Although the decision below places the Eighth Circuit with the Tenth and Eleventh Circuits, the decision does not materially alter or deepen the conflict that this Court has repeatedly declined to review, and some or all of the considerations that would have supported denial of the petitions in *Wheeler*, *supra* (No. 18-420), *McCarthan*, *supra* (No. 17-85), *Walker*, *supra* (No. 19-52), *Jackson*, *supra* (No. 20-911), and the other cases listed above would apply here as well.

2. In any event, this case would be an unsuitable vehicle for reviewing 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 postconviction relief under Section 2255 or Section 2241 based on *Rehaif* in comparable circumstances. As relevant here, the more prisoner-friendly circuits generally require a prisoner to show, among other things, 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). Petitioner cannot make that showing.

The record unequivocally establishes that petitioner knew he was a felon at the time he possessed a firearm, as required by *Rehaif*. The record shows that petitioner had several felony convictions—and served at least a year in prison for at least one of those convictions. 266 F.3d at 810; see PSR ¶¶ 32, 33, 34, 36. And petitioner accordingly testified at his own trial "that he knew he had been convicted of a felony." 266 F.3d at 810. According to petitioner's testimony, "he told the pawn shop owner that he had done time in Tennessee" and he "answered 'yes' to the question of whether he had been convicted of a prior felony." *Ibid.* Petitioner also admitted to the police at the time of his arrest "that he knew that he was not supposed to have a gun." *Id.* at 808. Furthermore, to find petitioner guilty of knowingly making a false statement in the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6), the jury had to find that petitioner possessed "knowledge of his prior felony convictions," *id.* at 811—the same finding required for a felon-in-possession conviction under *Rehaif*, see 139 S. Ct. at 2194. And as the court of appeals recognized in his direct appeal, ample evidence established that petitioner possessed that knowledge. 266 F.3d at 811. Accordingly, petitioner is not, as he contends, "imprisoned for a nonexistent crime," Pet. 33, or "for conduct that Congress has not criminalized," Pet. 34-35.

Indeed, petitioner would not be entitled to relief even had he raised the *Rehaif* issue on direct appeal or in a timely Section 2255 motion. This Court's decision

in *Greer* v. *United States*, 141 S. Ct. 2090 (2021), makes clear that a defendant raising a claim of *Rehaif* error for the first time on direct appeal cannot show that the error affected his substantial rights—as required on plain-error review—unless he can show "that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms." *Id.* at 2097. And a timely motion under Section 2255 in reliance on *Rehaif*'s adjusted mens rea requirement would not succeed without a stringent showing of actual (that is, factual) innocence. See *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").

The evidence recounted above—in particular, petitioner's multiple admissions (including at trial under oath) that he knew he was felon when he acquired the firearm—forecloses petitioner from any ability to show prejudice from a *Rehaif* error. And if petitioner would not be entitled to relief even had he raised his *Rehaif* claim in proceedings with more forgiving standards for substantive relief, *a fortiori* he would not be entitled to relief in a habeas proceeding even if the question presented were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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