CASE NO. 14-1294

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MATTHEW HALE,

Applicant - Appellant,

v.

J. OLIVER, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of Colorado
The Honorable Lewis T. Babcock, Senior Judge
Civil Action No. 14-cv-01233-LTB

APPELLEE'S SUPPLEMENTAL ANSWER BRIEF

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August 5, 2015

The court has determined that oral argument would be beneficial.

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ISSUES PRESENTED

This Court has ordered supplemental briefing on the following three questions:

(1) Does the question regarding the availability of a 28 U.S.C. § 2241 petition in *Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011)—"whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion"—apply to a claim where the facts were not known to the prisoner at the time he filed his initial 28 U.S.C. § 2255 motion?

(2) If the *Prost* framework does not apply, what should the Court consider when determining whether such a claim may be brought via the savings clause and § 2241?

(3) If Mr. Hale is barred from bringing his juror misconduct claim in a § 2241 petition, does his due process challenge implicate the type of serious constitutional question that this court left open in *Prost*, 636 F.3d at 593-94?

Order (filed Feb. 20, 2015).

STATEMENT OF THE CASE

A. Mr. Hale's previous motion under 28 U.S.C. § 2255

Mr. Hale was convicted in the United States District Court for the Northern District of Illinois of obstructing justice and soliciting a crime of violence, namely, the murder of a federal district judge. The Seventh Circuit on direct appeal affirmed the judgment of conviction. *See United States v. Hale*, 448 F.3d 971 (7th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1158 (2007).

Mr. Hale challenged his convictions by way of a timely-filed motion under 28 U.S.C. § 2255. *Hale v. United States*, 2010 WL 2921634, *1 (N.D. Ill. July 22, 2010) (unpublished). The Northern District of Illinois denied his motion, *id*. at 37, and subsequently denied his request for reconsideration of the court's order. *Hale v. United*

States, 2011 WL 5104630 (N.D. Ill. Oct. 27, 2011) (unpublished). The Seventh Circuit affirmed. *Hale v. United States*, 710 F.3d 711 (7th Cir. 2013).

B. Mr. Hale's present habeas application under 28 U.S.C. § 2241

Mr. Hale then filed his § 2241 habeas application in the District of Colorado, raising eight claims for relief. ROA at 4-14.[1] In claim seven of his habeas application, Mr. Hale argued that he possessed new evidence of misconduct by "M.H.," a member of his jury. ROA at 13-14. Mr. Hale's new claim is based on M.H.'s 2011 testimony in an unrelated case, *United States v. William White*. ROA at 47-51. M.H. testified that the day after he was selected to sit on Mr. Hale's jury, he learned that there was an article in the Chicago Tribune about jury selection in the case "that referenced" him. ROA at 49. He testified that, as a consequence, "I was worried about my safety and my partner's safety because . . . I'm a white person with an African-American man and we had known that Benjamin Smith went on a shooting rampage after being part of Matthew Hale's group, and so that was his way of showing obedience or faith to Matthew Hale, and I felt really vulnerable." ROA at 50.[2] Although M.H. did not testify that he had actually read the Chicago Tribune article, Mr. Hale contends that M.H. did, thereby disobeying the trial court's order not to read media coverage about the case. ROA at 38.

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[1] References to a page of the record on appeal filed in this case are to "ROA" and the page number printed on the lower right corner of the page.

[2] In essence, M.H. was concerned because he was identified in the media as a juror, and because he was aware of prior violent acts by Benjamin Smith (one of Mr. Hale's followers). M.H. did not discuss his attitudes toward Mr. Hale or Mr. Hale's guilt or innocence.

Mr. Hale asserted that he discovered this new evidence in 2011, more than three years after he had filed his § 2255 motion, and more than two and a half years before he filed his present § 2241 application. ROA at 13.

Mr. Hale alleged that, because this new evidence was not discovered until after he had filed his § 2255 motion, he could not have based his initial § 2255 motion on this evidence and thus the remedy provision of § 2255 is inadequate or unavailable. ROA at 13-14. In addition, he alleged that construing § 2255 as barring a claim of juror prejudice and misconduct would violate the Fifth Amendment. *Id*.

This Court has ordered supplemental briefing on claim seven.

SUMMARY OF THE ARGUMENT

This Court in *Prost* adopted a test for inadequacy or ineffectiveness under 28 U.S.C. § 2255(e)'s savings clause for claims that categorically elude permission for a second or successive motion under § 2255(h). But Mr. Hale does not raise such a claim. Rather, he raises a newly discovered evidence claim. New evidence claims like Mr. Hale's do not categorically elude permission for § 2255 relief. He can apply under § 2255(h)(1) for leave to file a second or successive § 2255 motion. He may not get approval, but that alone does not render § 2255 inadequate or ineffective for purposes of the savings clause. A convicted criminal can't resort to § 2241 just because he cannot satisfy § 2255(h). In addition, because Mr. Hale does not argue that his newly discovered evidence demonstrates that he is actually innocent, he has not raised a serious constitutional question. The district court's judgment should be affirmed.

ARGUMENT

I. Standard of Review

When reviewing the denial of a habeas petition under § 2241, this Court reviews the district court's legal conclusions de novo and accepts its factual findings unless clearly erroneous. *al-Marri v. Davis*, 714 F.3d 1183, 1186 (10th Cir. 2013).

II. Discussion

(1) Does the question regarding the availability of a 28 U.S.C. § 2241 petition in *Prost*—"whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion"—apply to a claim where the facts were not known to the prisoner at the time he filed his initial 28 U.S.C. § 2255 motion?

Answer: No. This Court's savings-clause test announced in *Prost* does not apply to Mr. Hale's claims. *Prost* did not set forth the framework for § 2241 petitions based on new evidence. *See Prost*, 636 F.3d at 587 n.7 ("Our holding is confined to circumstances where Congress has *not* authorized a second or successive motion") (emphasis in original). Instead, it adopted a savings-clause test for claims that categorically elude permission for a successive § 2255 motion, such as new retroactive decisions of statutory interpretation.

Prost involved such a decision. Mr. Prost had been convicted of money laundering, and after his direct appeal and § 2255 motion became final, the Supreme Court held in *United States v. Santos*, 553 U.S. 507 (2008), that the term "proceeds" in the money laundering statute means profits of the business, rather than gross receipts. *See* 553 U.S. at 514 (plurality opinion); *Prost*, 636 F.3d at 580. In response to *Santos*, Prost filed a § 2241 petition challenging his money-laundering conviction. *See Prost*,

636 F.3d at 580–81. This Court affirmed the district court's dismissal of Prost's habeas petition, holding that § 2255 was adequate and effective because Prost *could* have made his "proceeds" argument to the circuit court, even if this argument had been foreclosed by then-controlling circuit precedent. *See id.* at 590.

Newly discovered evidence claims, like Mr. Hale's claim, do not categorically elude permission for § 2255 relief. In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress made available second or successive § 2255 motions if the movant shows either (1) clear and convincing newly discovered evidence that the movant is actually innocent or (2) a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. *See* 28 U.S.C. § 2255(h); *Prost*, 636 F.3d at 583-84. Mr. Hale could have applied under § 2255(h)(1) for leave to file a second or successive § 2255 motion.

The *Prost* framework does not apply to newly discovered evidence because if it did, the savings clause in § 2255(e) would swallow § 2255(h)(1). New evidence, by definition, is evidence that was not available in a prior § 2255 motion. If *Prost's* test applies to such evidence, the savings clause would allow a claim of new evidence in a § 2241 petition, regardless of whether the evidence satisfies § 2255(h)(1) by clearly and convincingly showing that the movant is actually innocent. Congress could not have intended this result in enacting § 2255(h)(1). *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("AEDPA's central concern [is] that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.").

In short, the *Prost* test does not apply to a claim where the facts were not known to the prisoner at the time he filed his initial § 2255 motion.

(2) If the *Prost* framework does not apply, what should the Court consider when determining whether such a claim may be brought via the savings clause and § 2241?

Answer: The Court should consider whether the claim Mr. Hale is raising categorically eludes permission for § 2255 relief.

As shown above, new evidence claims do not categorically elude permission for § 2255 relief. Mr. Hale could have requested leave to file a second or successive § 2255 motion. His request may not have been granted, but that alone does not render § 2255 inadequate. A convicted criminal cannot resort to § 2241 just because he can't satisfy § 2255(h). The savings clause doesn't guarantee multiple opportunities to test a conviction or sentence. Section 2255(h) restricts second and successive motions to those raising newly discovered evidence of actual innocence or new constitutional rulings. "When Congress adopted § 2255(h), it was undoubtedly aware that prisoners might wish to press other sorts of arguments in second or successive motions." *Prost*, 636 F.3d at 585-86.

This Court did acknowledge in *Prost* that "the savings clause might have an additional role to play in . . . a second collateral attack based on newly discovered evidence [that] could for some reason not be brought in the sentencing court, *even though § 2255(h)(1) would permit it.*" *Prost*, 636 F.3d at 587 n. 7 (emphasis added). But this Court need not decide the role the savings clause might play in the present case. Mr. Hale's § 2241 application is not based on newly discovered evidence that would be

permitted by § 2255(h)(1). His juror misconduct claim is not a claim of actual innocence, nor does Mr. Hale contend it is.

It does not matter for purposes of the savings clause that Mr. Prost may have no available relief. Nor does it matter that his new evidence of juror misconduct is insufficient to meet § 2255(h)(1)'s stringent standard for filing a second or successive petition. Although § 2255(h)(1) contemplates that new evidence may be a basis for a second or successive petition, when that evidence falls short, the "[f]ailure to obtain *relief* under § 2255 does not establish that the *remedy* so provided is either inadequate or ineffective." *Prost*, 636 F.3d at 586 (emphasis and alteration in original) (quoting *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996)). "The savings clause doesn't guarantee results, only process." *Id.* at 590. Mr. Hale fails to demonstrate that the opportunity to seek a remedy under § 2255 is "genuinely absent." *Id.* at 588; *Jameson v. Samuels*, 555 F. App'x 743, 746 (10th Cir. 2014) (unpublished).

In other words, the savings clause does not trump § 2255(h). "[I]f the § 2255 remedial mechanism could be deemed 'inadequate or ineffective' any time a petitioner is barred from raising a meritorious second or successive challenge to his conviction[,] subsection (h) would become a nullity, 'a meaningless gesture.'" *Prost*, 636 F.3d at 586 (quoting *United States v. Barrett*, 178 F.3d 34, 50 (1st Cir. 1999)); *see United States v. Gilbert*, 640 F.3d 1293, 1308 (11th Cir. 2011) (en banc) (recognizing that if the statutory bar on second and successive motions means that § 2255 is inadequate or ineffective to test the legality of a prisoner's detention, "the savings clause would eviscerate the second or successive motions bar, and prisoners could file an endless stream of § 2255

motions…."); *see also United States v. Guerrero*, 415 F. App'x 858, 859 (10th Cir. Jan. 31, 2011) (unpublished) ("That [defendant] may be barred from bringing another § 2255 motion . . . does not establish that the remedy set out in § 2255 is inadequate or ineffective.").

Fundamental canons of statutory construction support the conclusion that the generally worded and ambiguous savings clause, which was first enacted in 1947, cannot override the specifically worded and clear statutory bar on second or successive motions that was enacted as part of AEDPA in 1996. *Gilbert*, 640 F.3d at 1308. An ambiguous or general statutory provision enacted at an earlier time must yield to a specific and clear provision enacted at a later time. *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."); *Kay Elec. Co-op v. City of Newkirk, Okla.*, 647 F.3d 1039, 1044 (10th Cir. 2011) (same); *United States v. Estate of Romani*, 523 U.S. 517, 530–533 (1998).

Accordingly, the district court in the instant case got it right when it ruled that it lacked statutory jurisdiction over claim seven:

> Mr. Hale's argument with respect to claim seven, the claim premised on evidence that allegedly was unknown to him and undiscoverable until 2011, also fails to demonstrate the remedy available pursuant to § 2255 is inadequate or ineffective because § 2255(h)(1) contemplates that newly discovered evidence may be the basis for a second or successive § 2255 motion. Mr. Hale's assertion that § 2255(h)(1) only applies to newly-discovered evidence of innocence and not other newly-discovered evidence does not alter this conclusion. "[T]he mere fact that [Mr. Hale] is precluded from filing a second § 2255 petition does not establish that the remedy in § 2255 is inadequate." *See Caravalho* [*v. Pugh*], 177 F.3d [1177,] 1179 [(10th Cir. 1999)]. Furthermore, the Court need not consider whether the

> particular newly-discovered evidence claim Mr. Hale seeks to raise satisfies the requirements of § 2255(h)(1) because "[t]he savings clause doesn't guarantee results, only process." *Prost*, 636 F.3d at 590; *see also Jameson v. Samuels*, – F. App'x –, No. 13-6237, 2014 WL 292620 at *3 (10th Cir. Jan. 28, 2014) (concluding that remedy provided in the sentencing court pursuant to § 2255 was not inadequate or ineffective for claims premised on newly discovered evidence even though the new evidence was insufficient to meet the stringent standard for filing a second or successive motion under § 2255(h)(1)).

ROA at 104-05.

Because the *Prost* framework does not apply, this Court should consider whether Mr. Hale's claim categorically eludes permission for § 2255 relief. His claim does not, and accordingly, § 2255 is neither inadequate nor ineffective to test the legality of his detention.

(3) **If Mr. Hale is barred from bringing his juror misconduct claim in a § 2241 petition, does his due process challenge implicate the type of serious constitutional question that this Court left open in *Prost,* 636 F.3d at 593-94?**

Answer: No. Mr. Hale's due process challenge does not implicate the type of serious constitutional question left open in *Prost*. No constitutional problem is presented if Mr. Hale's evidence does not satisfy § 2255(h)(1). Congress has required a clear and convincing showing of actual innocence to satisfy § 2255(h)(1). Mr. Hale's allegations, even if true, don't satisfy this requirement.

In *Prost*, this Court recognized that

> [w]hether the savings clause may be used in the fashion the Second and Third Circuits [in *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997), and *In re Dorsainvil*, 119 F.3d 245 (3rd Cir. 1997), respectively] have suggested to avoid serious constitutional questions arising from application of § 2255(h) is an important question. So are the questions whether, when,

> and how the application of § 2255(h)'s limits on second or successive motions might (ever) raise a serious constitutional issue.

Prost, 636 F.3d at 594. This Court in *Prost* "left open the possibility that this circuit in a future case might permit a petitioner in Mr. Prost's position to invoke the savings clause for the constitutional avoidance reasons stated by the Second and Third Circuits." *Id*. at 598 n.15.

The Second and Third Circuits have generally construed the savings clause to permit the filing of a habeas corpus petition pursuant to § 2241 only when a change in statutory construction made retroactive by the Supreme Court established that the petitioner had been found guilty of what turned out to be a non-existent offense. *See Triestman*, 124 F.3d at 378-79 ("[W]e find that serious Eighth Amendment and due process questions would arise with respect to the AEDPA if we were to conclude that, by amending § 2255, Congress had denied Triestman the right" to challenge by way of a § 2241 petition his claim of actual innocence based on the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995)); *Dorsainvil*, 119 F.3d at 248 ("Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue.").

Mr. Hale's juror misconduct claim does not fall within this small class of situations. He does not claim that, as a consequence of the alleged juror misconduct, he has been convicted and imprisoned for conduct that is not criminal. As a result, he has not shown—even under Second and Third Circuit jurisprudence—that if § 2255

forecloses judicial review of his juror misconduct claim, then § 2255 violates his right to due process and is unconstitutional.

In only "extremely limited circumstances" might § 2255 be inadequate or ineffective. For example, the remedy available under § 2255 may be inadequate or ineffective if the original sentencing court has been abolished; the sentencing court refuses to consider the § 2255 motion altogether or inordinately delays consideration of the § 2255 motion; or when the petitioner is sentenced by three separate courts, none of which individually could grant complete relief. *See Caravalho,* 177 F.3d at 1178 (listing cases). Mr. Hale does not present any of these circumstances. Failure to permit review of Mr. Hale's juror misconduct claim under § 2241 would not raise serious constitutional questions.

Mr. Hale also argues that refusing to apply the savings clause to his juror misconduct claim would violate the Suspension Clause of the Constitution, Art. I, § 9. He is incorrect. In *Felker v. Turpin,* 518 U.S. 651 (1996), the petitioner claimed the Suspension Clause prohibited AEDPA's clamp-down on second or successive petitions in 28 U.S.C. § 2254 cases. The Supreme Court held that the increased restrictions the statute placed on second or successive habeas petitions do not violate the Suspension Clause. *Felker,* 518 U.S. at 654. The Court explained how the "[t]he writ of habeas corpus known to the Framers was quite different from that which exists today," and traced its evolution over two centuries. *Id.* at 663–64. The Court acknowledged that the AEDPA "works substantial changes" to the authority of federal courts to grant the writ, *id.* at 654, and "further restricts the availability of relief to habeas petitioners," but explained that

"judgments about the proper scope of the writ are normally for Congress to make," *id.* at 664 (quotation marks omitted). Describing the law restricting second and successive filings as "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," the Court concluded that "[t]he added restrictions which the Act places on second or successive petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." *Id.* at 664.

Although *Felker* was a § 2254 case, the Suspension Clause issue is essentially the same in § 2255 cases. *See In re Alvarado*, No. 10-4205, 2010 WL 9531122 (10th Cir. Dec. 2, 2010) (unpublished) (rejecting a suspension clause challenge to § 2255(h) restrictions). The changes made by the AEDPA restrictions on second or successive filings are materially identical in both types of cases; the evolution of the remedy and restrictions on it are materially identical; and the relationship of the AEDPA changes to that evolution are materially identical. *Gilbert*, 640 F.3d at 1317.

In addition, Mr. Hale relies on the Seventh Circuit's recent decision in *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc), as authorizing his access to § 2241 via the savings clause. *Webster* is inapposite. In that case, the Seventh Circuit held that there is no categorical bar against use of the savings clause—thereby allowing a petitioner to bring a § 2241 petition—in cases where new evidence would reveal that the Constitution categorically prohibits a certain penalty. It noted that a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence. *Id.* at 1139. The circuit court relied significantly on its earlier decision in *In re Davenport*,

147 F.3d 605 (7th Cir. 1998), where it held that the remedy under § 2255 was inadequate or ineffective for a case in which the Supreme Court had definitively ruled that the conduct for which the petitioner was convicted and incarcerated was not a crime under the statute. *Webster*, 784 F.3d at 1138. *Webster* extended the *Davenport* test, which this Court rejected in *Prost*. *Prost*, 636 F.3d at 592-93. But Mr. Hale's § 2241 petition does not concern an allegedly unconstitutional sentence. Nor does it concern a change in the law defining the crimes of which Mr. Hale was convicted.

Ultimately, the district court's reading of the savings clause is consistent with the law in this circuit. "Only in rare instances will § 2255 fail as an adequate or effective remedy to challenge a conviction or the sentence imposed." *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010). *See also Caravalho*, 177 F.3d at 1178 (The remedy available pursuant to § 2255 is inadequate or ineffective only in "extremely limited circumstances."). This case does not present such extremely limited circumstances.

CONCLUSION

The district court's order dismissing Mr. Hale's § 2241 habeas application for lack of jurisdiction should be affirmed and this matter should be dismissed.

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered oral argument.

DATED: August 5, 2015

Respectfully submitted,

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I hereby certify that with respect to the foregoing

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s/Dorothy Burwell
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2015, I electronically filed the foregoing using the CM/ECF system which will send an electronic notification to the following e-mail address:

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