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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. TIMOTHY MICHAEL HISEY, Defendant - Appellant.	No. 20-3106

Appeal from the United States District Court
for the District of Kansas
(D.C. Nos. 5:20-CV-04010-DDC &
5:18-CR-40063-DDC-1)

Grant R. Smith, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, on behalf of the Defendant-Appellant.

Jared S. Maag, Assistant United States Attorney (Stephen R. McAllister, United States Attorney, and James A. Brown, Assistant United States Attorney, Chief, Appellate Division, with him on the brief), Topeka, Kansas, on behalf of the Plaintiff-Appellee.

Before **BACHARACH**, **EBEL**, and **PHILLIPS**, Circuit Judges.

BACHARACH, Circuit Judge.

In 2018, Mr. Hisey pleaded guilty to the federal offense of unlawfully possessing firearms under 18 U.S.C. § 922(g)(1). Among the elements was a prior conviction for "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). At the plea hearing, Mr. Hisey admitted that he had a prior felony conviction in Kansas.

After pleading guilty, Mr. Hisey moved to vacate his conviction under 28 U.S.C. § 2255, arguing that his guilty plea had been unknowing and involuntary. The district court dismissed the motion based on procedural default because Mr. Hisey had failed to raise this claim in his direct appeal.

We reverse, concluding that Mr. Hisey has overcome the procedural default by showing actual innocence. He did not commit the underlying offense (unlawfully possessing firearms after a felony conviction) because he had no prior conviction punishable by more than a year in prison.

I. Mr. Hisey was convicted in Kansas and obtained a mandatory punishment of probation and drug treatment.

In 2016, Mr. Hisey was convicted in Kansas of possessing controlled substances. *See* Kan. Stat. Ann. § 21–5706(a). Given the conviction, a Kansas state court had to determine Mr. Hisey's sentence.

For drug crimes, Kansas courts ordinarily decide the sentence by using a guideline grid. *See* Kan. Stat. Ann. § 21–6805. Using this grid, the court calculates a presumptive sentencing range for the crime based on

- the severity of the offense (the vertical axis) and
- the defendant's criminal-history category (the horizontal axis).

See id.

Using the grid, the sentencing court found that Mr. Hisey had an offense level of "V" and a criminal history category of "C." *See* Kan. Stat. Ann. § 21–5706(c)(1); R. vol. 1, at 15. So his presumptive sentencing range was imprisonment for 28 to 32 months. *See* Kan. Stat. Ann. § 21–6805(a).

SENTENCING RANGE- DRUG OFFENSES

Categories→	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felony	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

Presumptive Probation
Border Box
Presumptive Imprisonment

•Fines not to exceed $500,000 (SL1-SL2), $300,000 (SL3-SL4), $100,000 (SL5)

•Severity level of offense increases one level if controlled substance or analog is distributed or possessed w/ intent to distribute on or w/in 1000 ft of any school property.

But this grid doesn't dictate the sentence for every defendant. For example, a court must impose a sentence outside the grid, without any prison time, if the defendant is

- an adult Kansan who is lawfully in the United States,
- convicted of a felony under Kan. Stat. Ann. § 21–5706,

- subject to a presumptive sentencing range between V-C and V-I on the sentencing grid, and
- eligible for an off-grid sentence after two assessments for drug abuse and criminal risk.

Kan. Stat. Ann. § 21–6824(a)–(c), (h). If a defendant meets these requirements, the sentencing court must put the defendant on probation and require drug treatment instead of prison time. Kan. Stat. Ann. § 21–6824(c); *see State v. Swazey*, 357 P.3d 893, 897 (Kan. Ct. App. 2015) (concluding that upon satisfaction of § 21–6824's requirements, its "mandatory provisions" "control[]" the defendant's sentence); *see also State v. Andelt*, 217 P.3d 976, 983 (Kan. 2009) (concluding that an earlier version of the statute required drug treatment for qualifying offenders).

At sentencing, the court found that under the grid, the presumptive sentencing range was 28 to 32 months. But given Mr. Hisey's satisfaction of the statutory requirements for a sentence outside the grid, the court imposed drug treatment and probation instead of imprisonment. With these terms, the court explained that a violation of the conditions would expose Mr. Hisey to possible revocation of probation and a prison term of 30 months.

II. In federal court, Mr. Hisey pleaded guilty to possessing firearms after a felony conviction.

Mr. Hisey was later charged with unlawfully possessing firearms on July 17, 2017. According to the government, the possession was unlawful

because Mr. Hisey had been convicted of a crime punishable by imprisonment for longer than a year. 18 U.S.C. § 922(g)(1). For this charge, the government relied on the Kansas conviction for possessing controlled substances. Mr. Hisey pleaded guilty to unlawful possession of firearms, and the court imposed a judgment of conviction.

III. Mr. Hisey can overcome procedural default by showing actual innocence.

In moving to vacate the conviction, Mr. Hisey challenges his guilty plea, arguing that it was unknowing and involuntary. Generally, a defendant may collaterally attack a guilty plea as unknowing and involuntary only if he had challenged the plea through a direct appeal; otherwise, the challenge is ordinarily subject to procedural default. *Bousley v. United States*, 523 U.S. 614, 621 (1998). Mr. Hisey did not challenge his guilty plea on direct appeal, so his claim would ordinarily be subject to procedural default.

But a defendant challenging the validity of a guilty plea can overcome a procedural default by showing actual innocence. *Id.* at 622. Mr. Hisey argues that he is actually innocent. To prevail on this argument, Mr. Hisey must show that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *United States v. Powell*, 159 F.3d 500, 502 (10th Cir. 1998) (quoting *Bousley*, 523 U.S. at 623).

IV. Mr. Hisey is actually innocent because his Kansas conviction was not for a crime punishable by more than one year in prison.

In this case, actual innocence turns on whether the Kansas conviction was punishable by over a year in prison. 18 U.S.C. § 922(g)(1); *see* pp. 1–2, above. To answer this question, we consider

- what the term "punishable" means and what the pertinent time-period is,
- whether we consider potential punishment for a hypothetical defendant or for Mr. Hisey in particular, and
- what information we can consult to determine Mr. Hisey's potential term of imprisonment on his Kansas conviction when he possessed the firearms.

A. We consider whether the drug crime exposed Mr. Hisey to more than a year in prison when he possessed the firearms.

The question is whether Mr. Hisey's drug crime was "punishable" by over a year in prison. The term "punishable" means "capable of being punished by law or right." *See Schrader v. Holder*, 704 F.3d 980, 986 (D.C. Cir. 2013) (quoting *Webster's Third New International Dictionary* 1843 (1993)); *see also id.* (stating that "the commonsense meaning of the term 'punishable'" is "any punishment capable of being imposed").

So we consider whether the drug crime could have subjected Mr. Hisey to imprisonment for over a year. To answer that question, we apply Kansas's sentencing law. *See United States v. Oman*, 91 F.3d 1320, 1321 (9th Cir. 1996) ("The term 'crime[] punishable' [in 18 U.S.C. § 922(g)(1)] refers to crimes defined by the law of the jurisdiction in which the

predicate crime arose."). In applying Kansas law, we focus on the moment that Mr. Hisey possessed the firearms. *See United States v. Benton*, 988 F.3d 1231, 1232 (10th Cir. 2021) (stating that 18 U.S.C. § 922(g) applies only if the defendant had knowledge of the relevant status when he or she possessed the firearm).

B. We consider the possibility of a prison term of more than one year for Mr. Hisey, not a hypothetical defendant.

A crime is punishable by "the maximum amount of prison time a *particular* defendant could have received." *United States v. Brooks*, 751 F.3d 1204, 1213 (10th Cir. 2014). So we consider whether Mr. Hisey's drug conviction—rather than the conviction of a hypothetical defendant—could have triggered imprisonment for over a year when he possessed the firearms.

C. In determining the possible prison term for Mr. Hisey when he possessed the firearms, we confine ourselves to his record of conviction.

To determine whether Mr. Hisey could have been imprisoned for more than a year when he possessed the firearms, we consider only his "record of conviction." *United States v. Brooks*, 751 F.3d 1204, 1208 (10th Cir. 2014) (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 577 n.12 (2010)). "The mere possibility" of other facts "outside the record" will not

change the maximum prison term. *See Carachuri-Rosendo*, 560 U.S. at 582 (interpreting the Immigration and Nationality Act).

D. Mr. Hisey is actually innocent.

The Kansas sentencing court determined that Mr. Hisey had satisfied all of the requirements for probation and drug treatment in lieu of imprisonment. So the district court had to impose probation and drug treatment. *See* Kan. Stat. Ann § 21–6824; *State v. Swazey*, 357 P.3d 893, 897 (Kan. Ct. App. 2015).

Given the lack of discretion, the Kansas court could not sentence Mr. Hisey to imprisonment. So for this "*particular* defendant," the past conviction was not punishable by any prison time. *Brooks*, 751 F.3d at 1213. Because Mr. Hisey's past conviction had not been punishable with any prison time, possession of firearms didn't constitute a crime under 18 U.S.C. § 922(g)(1). *See United States v. Williams*, 5 F.4th 973, 975 (9th Cir. 2021) (concluding that a state crime is not punishable by imprisonment for over a year "when the statutory maximum sentence exceeds one year but the maximum sentence allowed under the State's mandatory sentencing guidelines does not"); *United States v. Haltiwanger*, 637 F.3d 881, 883–84 (8th Cir. 2011) (holding that a defendant's prior drug crime in Kansas didn't constitute a felony because his maximum sentence was limited to seven months' imprisonment even though offenders

with worse criminal histories could have been sentenced to over a year in prison).

E. We reject the government's counter-arguments.

The government disagrees, arguing that

- the presumptive sentencing range of 28 to 32 months controls,
- Mr. Hisey obtained an off-grid punishment only because of additional findings of fact, and
- Mr. Hisey's conviction was punishable by over a year in prison because his suspended sentence was for 30 months.

1. The key is the maximum prison term for this defendant, not the presumptive sentencing range.

The government asserts that the presumptive sentencing range (28–32 months) trumps the provisions for probation and drug treatment. But the presumptive sentencing range does not reflect "the maximum amount of prison time [this] *particular* defendant could have received." *Brooks*, 751 F.3d at 1213.

Granted, Mr. Hisey could have been imprisoned for up to 32 months if he had been subject to the sentencing grid. But he wasn't; his off-grid punishment was mandatory, so he could not have received *any* imprisonment. *See United States v. McAdory*, 935 F.3d 838, 844 (9th Cir. 2019) (concluding that a state conviction couldn't trigger conviction under § 922(g)(1) because the state's mandatory sentencing guidelines hadn't actually exposed the defendant to imprisonment for over a year).

2. Mr. Hisey's statutory maximum takes into account the additional findings at sentencing.

At oral argument, the government argued that Mr. Hisey had obtained an off-grid punishment only because of additional findings made at sentencing. Oral Argument at 28:33–28:59. But the same is true of Mr. Hisey's presumptive sentencing range: His presumptive range was 28 to 32 months only because the court made findings at sentencing (an offense level of "V" and a criminal history category of "C").

Similar findings are often necessary at sentencing, and this Court may consider these findings in determining whether a defendant has been convicted of a crime punishable by imprisonment for over a year. *See United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014). These factual findings relieved Mr. Hisey of *any* possible imprisonment for his conviction.

3. The existence of a suspended sentence doesn't make Mr. Hisey's drug conviction punishable by over a year in prison.

The government also argues that Mr. Hisey's Kansas conviction was punishable by over a year in prison because the sentencing court had imposed a suspended sentence of 30 months. But a 30-month prison term would be triggered only if the court were to revoke Mr. Hisey's probation.

a. Imprisonment would require further misconduct and new proceedings.

Revocation was possible only through new proceedings and a new hearing, where the State would need to prove a violation of the probation conditions. Kan. Stat. Ann. § 22–3716(b)(2) (2017).[1] Even with a new violation, a Kansas court generally couldn't revoke probation and impose a sentence of over a year; the court instead would generally need to start with lesser sanctions consisting of

- continuation or modification of the probation conditions and
- 2–3 days of confinement.

Kan. Stat. Ann. § 22–3716(c)(1)(A)–(B) (2017).[2] The court could also order confinement of up to 60 days. Kan Stat. Ann. § 22–3716(c)(11)(g) (2017).

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[1] This statute has been revised, but we use the 2017 version because Mr. Hisey possessed the firearms in July 2017.

[2] For a first violation, the court could bypass lesser sanctions and revoke probation only if

- Mr. Hisey had committed a "new felony or misdemeanor,"
- Mr. Hisey had absconded, or
- the lesser sanctions would not adequately serve Mr. Hisey's welfare or would jeopardize public safety.

Kan. Stat. Ann. § 22–3716(c)(8)–(9)(A) (2017).

If Mr. Hisey violated his probation conditions a second time after getting a lesser sanction of 2 to 3 days in jail, the court could (1) continue or modify the conditions and (2) order confinement of 120 or 180 days. Kan. Stat. Ann. § 22–3716(c)(1)(C)–(D) (2017); *see State v. Clapp*, 425 P.3d 605, 612 (Kan. 2018) (interpreting an earlier version of the statute and stating that § 22–3716(c) "sets out a graduated sanctioning scheme for probationers who violate the terms of their probation").

The court could revoke probation and sentence Mr. Hisey to the term earlier suspended, but only if he violated his conditions a third time after getting 120 to 180 days of confinement. Confronted with a third violation of probation conditions, the court could impose the sentence that had been previously suspended, "any lesser sentence," or any sentence that could have been imposed at the time of conviction. Kan. Stat. Ann. § 22–3716(c)(1)(E) (2017); *see State v. Reeves*, 403 P.3d 655, 658–59 (Kan. Ct. App. 2017) (interpreting an earlier version of the statute and stating that when probation is revoked, the trial court can impose the underlying suspended sentence or any lesser sentence).

Even if Mr. Hisey's probation were revoked, he would not necessarily be sentenced to his underlying sentence of 30 months' imprisonment. The court would retain discretion to impose a lesser sentence, *see* Kan. Stat. Ann. § 22–3716(c)(1)(E) (2017), unless Mr. Hisey had also been discharged from the drug treatment program for

- conviction of a new felony or
- "a pattern of intentional conduct" demonstrating a "refusal to comply with or participate in the treatment program."

Kan. Stat. Ann. § 21–6824(f)(1) (2017). If Mr. Hisey were discharged from the treatment program and the court revoked his probation, he would need to serve his suspended sentence of 30 months' imprisonment. *See* Kan. Stat. Ann. §§ 21–6824(f)(2), 21–6604(n)(2), 21–6805 (2017).

In short, even if Mr. Hisey were to engage in new misconduct (triggering new proceedings for revocation), imprisonment for more than one year would require the combination of numerous contingencies.

b. No such misconduct or new proceedings existed when Mr. Hisey possessed the firearms.

None of those contingencies had materialized by July 17, 2017, when Mr. Hisey possessed firearms. So when he possessed the firearms, the State of Kansas *could not have* imposed any prison time for the drug conviction. Given the impossibility of imprisonment for the drug crime as of July 17, 2017, Mr. Hisey did not violate 18 U.S.C. § 922(g)(1) by possessing firearms that day.

The dissent states that we should instead focus on "the moment of [Mr. Hisey's] conviction of the Kansas drug crime." Dissent at 12 n.4. If we were to focus on the moment of the conviction itself, we'd consider whether Mr. Hisey could have been initially sentenced to imprisonment for over a year. *See* Part IV(A), above (citing cases). But Mr. Hisey couldn't

have obtained an initial sentence of *any* prison time. *See* Part IV(D), above.

The dissent doesn't disagree; the dissent argues only that the conviction "laid a path to future imprisonment" if Mr. Hisey were to violate his probation. Dissent at 12. That path would require multiple contingencies before Mr. Hisey could be imprisoned for over a year. *See* Part IV(E)(3)(a), above. But even the single contingency recognized by the dissent—a future violation of probation—shows that when Mr. Hisey was convicted of the drug charge, the conviction itself could not have subjected Mr. Hisey to a prison term of over a year.

* * *

No reasonable juror could find Mr. Hisey guilty of unlawfully possessing firearms because his prior conviction hadn't triggered the possibility of any imprisonment at the moment that he possessed the firearms. We thus conclude that

- Mr. Hisey has overcome a procedural default and
- the district court should consider the merits of Mr. Hisey's motion to vacate.[3]

[3] Mr. Hisey also argues that he can overcome procedural default based on cause and prejudice. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). We need not consider this argument in light of Mr. Hisey's demonstration of actual innocence.

See United States v. Powell, 159 F.3d 500, 502 (10th Cir. 1998) (stating that a claim may be asserted collaterally if the petitioner shows actual innocence).[4]

V. The district court clearly erred by declining to consider Mr. Hisey's pro se motion.

In his pro se motion to vacate the conviction, Mr. Hisey not only challenged the validity of his guilty plea, but also claimed ineffective assistance of trial counsel. The district court declined to consider the claim of ineffective assistance, reasoning that Mr. Hisey had asserted this claim pro se while he was represented by counsel. This reasoning is incorrect because Mr. Hisey asserted the claim of ineffective assistance before getting legal representation in district court.

The district court received two motions on the same day: One was submitted by Mr. Hisey himself, the other by his attorney. R. vol. 1, at 8–22, 23–31. Mr. Hisey's pro se motion asserted two claims: (1) invalidity of the guilty plea and (2) ineffective assistance of counsel. The attorney's motion included the first claim but not the second one. The same day, the attorney entered an appearance for Mr. Hisey.

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[4] In his opening brief, Mr. Hisey requested a remand with instructions for the district court to grant his motion. Appellant's Opening Br. at 13. But at oral argument, Mr. Hisey acknowledged that the appropriate remedy would be a remand for consideration of the merits. Oral Argument at 4:44–6:10.

The district court declined to consider Mr. Hisey's pro se motion, reasoning that individuals cannot simultaneously represent themselves and employ counsel. R. vol. 1, at 57 n.1. So the district court never considered Mr. Hisey's claim of ineffective assistance of counsel.

The parties agree that the district court started from a clearly erroneous factual premise. Mr. Hisey did not file his motion while he was represented by counsel. The government concedes that under the prison mailbox rule, Mr. Hisey filed his pro se motion when he deposited it in the prison mail system. *See United States v. Gray*, 182 F.3d 762, 764 (10th Cir. 1999); Government's Resp. Br. at 27. And Mr. Hisey had mailed his motion five days before counsel entered an appearance. R. vol. 1, at 30.

Because Mr. Hisey wasn't yet represented by counsel, the district court should not have disregarded the pro se motion. The court should instead have determined whether the attorney's motion had supplemented or amended the pro se motion. *See, e.g.*, *United States v. Washington*, 890 F.3d 891, 898 (10th Cir. 2018) (considering counsel's motion as a supplement); *Braden v. United States*, 817 F.3d 926, 930 (6th Cir. 2016) (considering counsel's motion as an amendment).

The district court stated that it had effectively ruled on Mr. Hisey's pro se arguments by ruling on his attorney's arguments. R. vol. 1, at 57 n.1. This statement was incorrect: Mr. Hisey's pro se motion had included a claim of ineffective assistance; the attorney's motion hadn't.

The government argues that the error was harmless because Mr. Hisey's crime was punishable by over a year in prison. But this argument assumes the government's position on actual innocence, which we've already rejected. So we also reject the government's argument on harmlessness.

* * *

The district court shouldn't have declined to consider Mr. Hisey's pro se motion because he had filed it before his attorney entered an appearance. So on remand, the district court should determine whether the attorney's motion constituted a supplement or an amendment to Mr. Hisey's pro se motion.

VI. Conclusion

For these reasons, we reverse and remand for further proceedings consistent with this opinion. On remand, the district court must consider

- the merits of Mr. Hisey's claims under 28 U.S.C. § 2255 and
- the classification of his attorney's § 2255 motion as an amendment or supplement to the pro se motion.

20-3106, *United States v. Hisey*
PHILLIPS, J., dissenting

In 2016, Mr. Hisey was convicted in Kansas state court of drug possession and sentenced to mandatory drug treatment and a probationary term backed by 30 months of suspended prison time. In my view, this qualifies him as being convicted of a "crime *punishable* by imprisonment for a term exceeding one year." *See* 18 U.S.C. § 922(g)(1) (emphasis added). At conviction, Mr. Hisey was subject to serving more than a year of imprisonment *for that conviction*. Otherwise stated, he had no guarantee that his conviction was *unpunishable* by more than a year of imprisonment. Accordingly, at conviction, Mr. Hisey became a felon as defined by § 922(g)(1). His felon status didn't await a later probation revocation or anything else. It began on the day of his conviction and continued thereafter. Whether Mr. Hisey ever served a day in prison was irrelevant.

I begin by reviewing the district court's decision. I then explain why I disagree with the majority's reversal and its underlying legal analysis.

I. The District-Court's Order

The district court thoroughly reviewed the procedural background and legal issues presented in this case. *United States v. Hisey*, No. 18-40063-01-DDC, 2020 WL 2915036 (D. Kan. June 3, 2020).

In June 2018, a federal grand jury sitting in the District of Kansas returned an Indictment charging Mr. Hisey with having possessed firearms after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). *Id.* at *1. As the underlying predicate felony for this charge, the Indictment referenced Mr. Hisey's 2016 Kansas drug-possession conviction.

Id. (citation omitted). About three months after his federal indictment, Mr. Hisey pleaded guilty to the § 922(g)(1) charge. *Id.* at *2. In his plea agreement, Mr. Hisey acknowledged that his Kansas drug conviction was a felony offense. *Id.* (citation omitted). After his § 922(g)(1) conviction, the district court sentenced Mr. Hisey to a 40-month term of imprisonment. *Id.* (citation omitted). Mr. Hisey didn't appeal. *See id.*

About a year later, Mr. Hisey filed a timely Motion to Vacate under 28 U.S.C. § 2255. *Id.* (citation omitted). He relied on a case postdating his sentencing, *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *Id.* As Mr. Hisey correctly asserted, *Rehaif* announced a new rule—that § 922(g)(1) contains an element requiring proof that a defendant knew of his prohibited status at the time he possessed the firearms. *Id.* (citing *Rehaif*, 139 S. Ct. at 2200). Because the government hadn't proved that he knew his felon status when he possessed the firearms, he argued that his guilty plea had been involuntary.[1] *Id.* (citation and footnote omitted). In response, the government conceded that Mr. Hisey's claim was cognizable on collateral review. *Id.* It agreed that "(1) *Rehaif* applies retroactively, and (2) Mr. Hisey filed a timely motion under § 2255(f)(3)." *Id.* (citation omitted). But the government maintained that Mr. Hisey's Motion to Vacate was procedurally barred. *Id.* (citation omitted).

[1] In essence, in his Motion to Vacate, Mr. Hisey argued that though he had believed at the time of his guilty plea that he was a felon, he in fact wasn't. *See Hisey*, 2020 WL 2915036, at *2. In other words, he had mistakenly "known" of his felon status. That makes this case a bit of an oddball. As the district court noted, Mr. Hisey didn't need *Rehaif* to argue that his Kansas drug crime wasn't a felony: "Mr. Hisey could have filed a motion to dismiss the Indictment or proceeded to trial on the theory that his prior felony conviction did not expose him to a sentence of more than a year in prison." *Hisey*, 2020 WL 2915036, at *6 n.6.

A. Procedural Bar

The district court began by reviewing the standard governing procedural default. *Id.* at *3. It noted that "[t]he Supreme Court has 'strictly limited' the circumstances under which a defendant may attack his guilty plea on collateral review." *Id.* (citing *Bousley v. United States*, 523 U.S. 614, 621 (1998)). The court further noted that "the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Id.* (citation omitted). Because Mr. Hisey had failed to appeal, the court stated that it must enforce the procedural bar "unless cause and prejudice or a miscarriage of justice is shown." *Id.* (quoting *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994)).

i. Cause

The court observed that Mr. Hisey was seeking to establish "cause" by "show[ing] that the [*Rehaif*] claim was 'so novel that its legal basis was not reasonably available to counsel.'" *Id.* (quoting *United States v. Wiseman*, 297 F.3d 975, 979 (10th Cir. 2002)). The court agreed that a petitioner can treat novelty of a constitutional claim "as the functional equivalent of 'cause.'" *Id.* (citing *Reed v. Ross*, 468 U.S. 1, 17 (1984)). Of *Reed*'s three options for doing so, the court declared that Mr. Hisey was asserting the second one, namely, that "he had cause not to present a *Rehaif*-type challenge to his guilty plea before now because *Rehaif* 'overturned the unanimous precedent of "all the Federal Courts of Appeals and all the state courts of last resort," who had "agreed that knowledge of status was not required[.]"'" *Id.* (alteration in original) (quoting Doc. 31 at 7 (quoting *Rehaif*, 139 S. Ct. at 2210 (Alito, J., dissenting))).

The district court rejected Mr. Hisey's novelty-for-cause argument. *Id.* It noted that our circuit court has explained that "the question in this context is whether 'a constitutional claim is so novel that its legal basis was not reasonably available to counsel.'" *Id.* (quoting *Evans v. Horton*, 792 F. App'x 568, 571 (10th Cir. 2019)). It further noted that Mr. Hisey's *Rehaif* argument was available to him at the time of his conviction. *Id.* As support, the court pointed to *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012), in which dissenting Judge Gorsuch noted that other circuits had already addressed this argument. *Id.* at *4 (citing *Games-Perez*, 695 F.3d at 1124 (Gorsuch, J., dissenting from denial of reh'g en banc)). Mindful of this, the district court stated that "[o]ne hardly can characterize Mr. Hisey's argument as a novel one" because "the legal basis for this argument reasonably was available to counsel." *Id.* (footnote omitted). In short, Mr. Hisey's unlikelihood of success on the argument didn't excuse his not raising it on direct appeal. *Id.* I agree with the district court's analysis and result.

ii. Prejudice

After ruling that Mr. Hisey had failed to show cause, the district court could have skipped considering whether Mr. Hisey had showed prejudice. *See United States v. Frady*, 456 U.S. 152, 167–68 (1982) (holding that petitioner must show both cause and prejudice to overcome a procedural default). But the court addressed prejudice too. It noted that Mr. Hisey would need to show "actual prejudice," that is, "that the error of which he complain[ed] [was] an 'error of constitutional dimensions' that 'worked to his actual and substantial disadvantage.'" *Hisey*, 2020 WL 2915036, at *4 (quoting *United States v. Snyder*, 871 F.3d 1122, 1128 (10th Cir. 2017)). The court recited Mr. Hisey's

position that the *Rehaif* error had prejudiced him by inducing his guilty plea to the § 922(g)(1) charge. *See id.* at *6. In this regard, he contended that he wouldn't have pleaded guilty if he had known that his Kansas drug-possession conviction wasn't a felony. *Id.* at *5.

This set the stage. In deciding whether Mr. Hisey was entitled to relief on his Motion to Vacate, the district court had to determine whether Mr. Hisey's Kansas drug conviction met § 922(g)(1)'s condition that when caught with the firearms he was "a person who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." *Id.* That led the district court into the Kansas sentencing statutes. *Id.* As the majority notes, Mr. Hisey had a criminal-history category of "C" and an offense level of "V" on the sentencing grid. Majority Op. at 3 (citing Kan. Stat. Ann. § 21-5706(c)(1); (second citation omitted)). This gave a presumptive sentence range of 28 to 32 months of imprisonment. *See* Kan. Stat. Ann. § 21-6805(a). But under Kan. Stat. Ann. § 21-6824(a), Mr. Hisey qualified for "a nonprison sanction of certified drug abuse treatment programs for certain offenders. . . ." *Hisey*, 2020 WL 2915036, at *5 n.5 (citations omitted). That being so, the parties agreed that the sentencing court had to "sentence defendant to a drug treatment program rather than to a custody sentence." *Id.* The sentencing court also ordered a term of probation with a suspended 30-month term of imprisonment." *Id.* at *8.

From this, the federal district court determined that "Mr. Hisey faced a durational sentence as long as 30 months in prison. The fact that he qualified for drug treatment under Kan. Stat. Ann. § 21-6824(a) does not change the sentencing exposure." *Id.*

(citations omitted). For this reason, as well as Mr. Hisey's failure to "explicitly argue[] that because the state court sentenced him to drug treatment, he lacked knowledge that his prior conviction was a qualifying felony under § 922(g)," the federal district court ruled that "Mr. Hisey ha[d] failed to establish prejudice, and this conclusion bar[red] his claim procedurally." *Id.* (citation omitted). Again, I agree with the district court's analysis and result.

iii. Actual Innocence

Alternatively, Mr. Hisey asserted his actual innocence for the § 922(g)(1) offense to which he had pleaded guilty. *Id.* at *9 (citation omitted). The district court acknowledged that "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *Id.* (alteration in original) (quoting *McQuiggen v. Perkins*, 569 U.S. 383, 392 (2013)). But it also recognized that "[t]he 'high hurdle' defendants face when claiming actual innocence 'becomes even higher' after a guilty plea." *Id.* (quoting *United States v. McAbee*, 685 F. App'x 682, 685 (10th Cir. 2017)). The district court rejected Mr. Hisey's actual-innocence claim on the same grounds that it rejected his prejudice claim. *Id.* (citation omitted). I agree with this too.

The majority reverses after ruling that Mr. Hisey is actually innocent of the § 922(g)(1) crime. Majority Op. at 8–14. It agrees with Mr. Hisey that his Kansas drug-possession conviction resulted in a maximum sentence of mandatory drug treatment, while acknowledging that Mr. Hisey was nonetheless subject to a probationary term backed by 30 months of suspended prison time. *Id.* at 9–10. Yet under these

circumstances, the majority concludes that despite Mr. Hisey's Kansas drug-possession conviction, he didn't qualify as a person who had been convicted of "a crime punishable by imprisonment for a term exceeding one year." *Id.* at 2 (citing § 922(g)(1)). I disagree.

In my view, the majority errs by divining this result from two inapposite cases, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), and *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014). So it helps to review these two cases in some detail to see what they cover and what they don't.

1. *Carachuri-Rosendo v. Holder*

In *Carachuri-Rosendo*, the Court needed to decide whether the petitioner's two Texas misdemeanor drug-possession convictions qualified as "aggravated felonies" and thus barred him from cancellation of removal or waiver of inadmissibility in immigration proceedings. 560 U.S. at 566. The Court reversed the Fifth Circuit's determination that "a simple drug possession offense, committed after the conviction for a first possession offense became final, is always an aggravated felony." *Id.* The Court required that the second or subsequent simple-possession state conviction be "based on the fact of a prior conviction." *Id.* To qualify as an aggravated felony, a state recidivist simple-possession offense must be "punishable" as a federal felony under the Controlled Substances Act. *Id.* at 567–68. And under the Controlled Substances Act, a prosecutor must "charge the existence of the prior simple possession conviction before trial, or before a guilty plea." *Id.* at 568 (citing 21 U.S.C. § 851(a)(1)) (footnote omitted). Any recidivist enhancement requires "[n]otice, plus an opportunity to challenge the validity of the prior conviction." *Id.* at 568–69 (citing § 851(b)–(c)). The Court ruled that the same prerequisites are

necessary "to 'authorize' a felony punishment, 18 U.S.C. § 3559(a), for the type of simple possession at issue" in Mr. Carachuri-Rosendo's case. *Id.* at 569.

The Court observed that "[t]he 'aggravated felony' definition does explain that the term applies 'to an offense described in this paragraph whether in violation of Federal or State law.'" *Id.* (citing 8 U.S.C. § 1101(a)(43)). But the Court referred back to its decision in *Lopez v. Gonzales*, 549 U.S. 47, 56 (2006), in which it had determined that for a state drug conviction to qualify as an "aggravated felony," it "must be punishable as a felony under *federal* law." *Id.* Further, the state offense must "proscribe[] conduct punishable as a felony under that federal law." *Id.* (citing *Lopez*, 549 U.S. at 60). In *Lopez*, the petitioner had received a five-year state sentence, but "the conduct of his offense was not punishable as a felony under federal law, and this prevented the state conviction from qualifying as an aggravated felony for immigration law purposes." *Id.* at 569–70 (citing *Lopez*, 549 U.S. at 55).

The Court rejected the government's argument that Mr. Carachuri-Rosendo, "despite having received only a 10-day sentence for his Texas misdemeanor simple possession offense, nevertheless ha[d] been 'convicted' of an 'aggravated felony' within the meaning of the INA." *Id.* at 570. The government argued that if petitioner had been prosecuted "in federal court instead of state court, he *could have been* prosecuted as a felon and received a 2-year sentence based on the fact of his prior simple possession offense." *Id.* The Court acknowledged that "to qualify as an 'aggravated felony' under the INA, the conduct prohibited by state law must be punishable as a felony under federal law." *Id.* at 581 (citing *Lopez*, 549 U.S. at 60). But the Court further noted that "as the

text and structure of the relevant statutory provisions demonstrate, the defendant must *also* have been *actually convicted* of a crime that is itself punishable as a felony under federal law." *Id.* at 582.[2] Because the state prosecutor had "declined to charge [Mr. Carachuri-Rosendo] as a recidivist," he could not be deemed convicted of a felony punishable under the Controlled Substances Act. *Id.*

2. *United States v. Brooks*

In *Brooks*, our court needed to decide whether the defendant qualified as a career offender under U.S.S.G. § 4B1.1. 751 F.3d at 1206. His instant offense was for drug trafficking, and the district court found the necessary two predicate offenses to qualify Mr. Brooks as a career offender. *Id.* at 1208. Mr. Brooks disputed whether one of these predicate offenses, his previous Kansas conviction for eluding an officer, was a crime of violence under § 4B1.2(a), which, among other things, required that it be "punishable by imprisonment for a term exceeding one year." *See id.* Under the Kansas sentencing grid, the maximum sentence available for Mr. Brooks's eluding offense was seven months in jail. *Id.* The court imposed a six-month sentence. *Id.*

Our court agreed with the defendant that *Carachuri-Rosendo* abrogated our decision in *United States v. Hill*, 539 F.3d 1213 (10th Cir. 2008), which, applying Kansas sentencing law, had looked to "the 'hypothetical worst recidivist' to determine the length of imprisonment for which a crime was punishable." *Id.* at 1208–09. In *Brooks*, we noted

[2] The Court looked to Mr. Carachuri-Rosendo's "record of conviction" for a "finding of the fact of his prior drug offense," declining to rule on whether that alone would suffice or instead whether a recidivism charge would have required additional procedures. *Carachuri-Rosendo*, 560 U.S. at 576.

that *Carachuri-Rosendo* had ruled that "a recidivist finding could *only* set the maximum term of imprisonment 'when the finding is a part of the record of conviction.'" *Id.* at 1210 (quoting *Carachuri-Rosendo*, 560 U.S. at 577 n.12). As "the record of conviction," the Court looked to "the sentence itself," "part of the 'judgment of conviction,'" and "the 'formal charging document[.]'" *Id.* at 1208, 1210–1211.

In view of this, this court ruled that the district court had erred by using "the hypothetical worst possible offender" standard to measure whether Mr. Brooks had been convicted of a "crime punishable by imprisonment for a term exceeding one year." *Id.* at 1207, 1213 (quoting § 922(g)(1)). Instead, we ruled that the proper standard is "the maximum amount of prison time a *particular* defendant could have received[.]" *Id.* at 1213. Because Mr. Brooks could receive a maximum sentence of only seven months in jail based on his own criminal history, we concluded that his eluding-an-officer offense couldn't qualify as a predicate crime of violence in the career-offender determination. *Id.*

3. The Majority Opinion

The majority opinion lays out the Kansas sentencing scheme well. I agree with what it says until it addresses what qualifies for actual innocence. There, the majority relies primarily on *Carachuri-Rosendo* and *Brooks*. But the difference is that unlike in *Carachuri-Rosendo*, the government in Mr. Hisey's case relies on the actual Kansas drug-possession offense of conviction—meaning its *actual*, not hypothetical, elements. And unlike in *Brooks*, the government here hasn't substituted a hypothetical defendant with a worst-case criminal history on the sentencing grid. Though both *Carachuri-*

Rosendo and *Brooks* are sensible and binding in their realms, neither intersects with Mr. Hisey's situation nor offers him any help.

Neither the majority nor Mr. Hisey cites a case ruling on the precise question before us: Does a sentence including a term of probation backed by a year-plus of suspended imprisonment qualify as "a crime punishable by imprisonment for a term exceeding one year"? *See* § 922(g)(1).[3] And Mr. Hisey's arguments don't fill the gap.

First, I disagree with the majority that the importance of the "record of conviction" in *Carachuri-Rosendo* has anything to do with Mr. Hisey's case. As mentioned, *Carachuri-Rosendo* ruled that "a recidivist finding could *only* set the maximum term of imprisonment 'when the finding is part of the record of conviction.'" *Brooks*, 751 F.3d at 1210 (quoting *Carachuri-Rosendo*, 560 U.S. at 577 n.12). As "the 'record of conviction'" the Court looked to "the sentence itself," "part of the 'judgment of conviction,'" or "the

[3] The majority cites *United States v. Haltiwanger*, 637 F.3d 881 (8th Cir. 2011), as "holding that a defendant's prior drug crime in Kansas didn't constitute a felony because his maximum sentence was limited to seven months' imprisonment even though offenders with worse criminal histories could have been sentenced to over a year in prison." Majority Op. at 8-9. But this is just another recidivist-enhancement case vacated and remanded back to the Eighth Circuit after *Carachuri-Rosendo*. *Haltiwanger*, 637 F.3d at 882, 884. At issue was whether the defendant's prior Kansas conviction for failing to affix a drug tax stamp was a "felony drug offense" under 21 U.S.C. § 841(b), which could have doubled his mandatory-minimum sentence from 10 to 20 years for his instant federal crack-cocaine-distribution offense. *Id.* at 882. The Eighth Circuit held that the Kansas conviction didn't qualify as a "felony drug offense" because the maximum sentence available under the Kansas statutes was seven months of jail time. *Id.* at 883. I agree with that. But Mr. Haltiwanger wasn't subject to more than a year of suspended prison time pending successful completion of a probationary term. That distinguishes this case from Mr. Hisey's. The same is true of the majority's cited Ninth Circuit cases of *United States v. Williams*, 5 F.4th 973 (9th Cir. 2021), and *United States v. McAdory*, 935 F.3d 838 (9th Cir. 2019).

'formal charging document[.]'" *See Carachuri-Rosendo*, 560 U.S. at 577 n.12. But what matters is *why* the Court looked to the "record of conviction" documents. It did so to see whether the recidivist enhancer had been charged and proved in the state court prosecution. That mattered in measuring whether the conviction qualified as an "aggravated felony" in immigration proceedings.

Nothing in *Carachuri-Rosendo* suggests that Mr. Hisey's "record of conviction" would have to show a probation violation and ensuing prison sentence. As mentioned, Mr. Hisey became a felon at conviction.[4] The only document needing shown would be the one imposing the probationary term backed by 30 months of imprisonment. And here that sentence is undisputed.

Second, the majority requires that the conviction itself "trigger" a potential prison sentence exceeding one year. Majority Op. at 7–9. His conviction did just that. The conviction laid a path to future imprisonment: violate probation and off to prison for up to 30 months. Mr. Hisey was subject to a year-plus of suspended prison time. This suspended prison time arose directly from his 2016 Kansas drug-possession conviction,

[4] Throughout its opinion, the majority states that Mr. Hisey couldn't have been imprisoned for more than a year *at the moment that he possessed the firearms*. That confuses the moment that Mr. Hisey needed to know of his prohibited status as a felon (the moment he possessed the firearm) with the moment that he became a felon (the moment of his conviction of the Kansas drug crime). Mr. Hisey doesn't dispute that at the moment of conviction he was legally subject to a sentence including a probationary term backed by 30 months of suspended prison time. At that moment, he became a person convicted of a crime *punishable* by more than a year of imprisonment. *See Punishable*, Black's Law Dictionary (11th ed. 2019) ("1. (Of a person) subject to punishment <there is no dispute that Jackson remains punishable for these offenses>."). He retains his felon status.

and from nothing else. This being so, his original conviction was *punishable* by a term exceeding a year. Otherwise stated, Mr. Hisey's suspended prison time defeats any view that his Kansas drug crime was *unpunishable* by more than a year of imprisonment.[5]

For these reasons, I would affirm.

[5] With these views, I see no merit to any ineffective-assistance-of-counsel claim.