

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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JASON LUND,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Seventh Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

A federal habeas petitioner may overcome the one-year period of limitation in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) through a plea of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

Petitioner Jason Lund, a federal prisoner, filed an untimely habeas petition under AEDPA alleging that his sentence was imposed contrary to *Burrage v. United States*, 571 U.S. 204 (2014). He also alleged that he was actually innocent under *Burrage*. The Seventh Circuit held that petitioner could not use actual innocence to overcome AEDPA's statute of limitations and affirmed the denial of the habeas petition as untimely.

Does the Seventh Circuit's decision directly conflict with the holding of *McQuiggin v. Perkins*? And does the error warrant summary relief?

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Jason Lund respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### **OPINION BELOW**

The Seventh Circuit's decision is published at 913 F.3d 665 and is included as Appendix A. The Seventh Circuit's unpublished order denying rehearing en banc is included as Appendix B. The order of the United States District Court for the Eastern District of Wisconsin denying Petitioner's habeas petition is unpublished, though available in Westlaw at 2016 WL 3034322, and is included as Appendix C. The Seventh Circuit's decision in the underlying criminal case is published *sub nom United States v. Walker* at 721 F.3d 828 and is included as Appendix D.

### **JURISDICTION**

The Seventh Circuit entered judgment on January 17, 2019. Pet. App. 1a. The court denied Mr. Lund's timely petition for panel rehearing and rehearing en banc on March 19, 2019. Pet. App. 25a. This Court has jurisdiction under 28 U.S.C. §1254(1).

### **STATUTORY PROVISIONS INVOLVED**

28 U.S.C. §2255(a) provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. §2255(f) provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2244(d)(1) provides:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

## STATEMENT OF THE CASE

This Court has long understood that a habeas court may exercise its equitable discretion to look past procedural defenses to avoid a miscarriage of justice. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). A quintessential miscarriage of justice occurs when an innocent individual is incarcerated. See *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013). Thus, even under the more restrictive habeas rules enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas courts may excuse noncompliance with timeliness rules to avoid the continued imprisonment of an innocent individual. *Id.* at 397. In a “first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA’s passage intact and unrestricted.” *Ibid.* Yet here the Seventh Circuit held exactly the opposite: an innocent federal prisoner must remain imprisoned if he files his first petition for federal habeas relief too late. Because the Seventh Circuit’s decision affirming the district court’s denial of a first habeas petition conflicts with precedent from this Court, review is necessary.

This issue is also critically important. The Seventh Circuit’s decision will result in the continued incarceration of those who were convicted and punished for acts that the law does not make criminal. “There can be no room for doubt that such a circumstance ‘inherently results in a complete miscarriage of justice.’” *Davis v. United States*, 417 U.S. 333, 346 (1974). The Court should reverse the Seventh Circuit’s decision.



## A. Legal background

A prisoner who was convicted of a federal offense may move the sentencing court to vacate his sentence upon a claim that the sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. §2255(a). He must meet timeliness rules established by AEDPA, however: a petition must be filed within one year of, as relevant here, either the date on which the judgment of conviction becomes final or the date on which the right asserted was initially recognized by the Supreme Court. *Id.* §§2255(f)(1), (3). In the latter case, the right must be newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. *Id.* §2255(f)(3).

AEDPA governs federal habeas petitions filed by both state and federal prisoners. Both are subject to substantially the same statute of limitations. Compare 28 U.S.C. §2244(d)(1) with *id.* §2255(f).

Floyd Perkins’s conviction in a Michigan court for first-degree murder became final in 1997, but he did not file a federal habeas petition until 2008. *Perkins*, 569 U.S. at 388. He failed to meet the timeliness requirement of §2244(d)(1). *Id.* at 389. After the Sixth Circuit held that he was entitled nonetheless to proceed upon a showing of actual innocence, this Court granted certiorari “to resolve a Circuit conflict on whether AEDPA’s statute of limitations can be overcome by a showing of actual innocence.” *Id.* at 391. Notably, the Seventh Circuit had disagreed with the Sixth Circuit, holding that “[p]risoners claiming to be innocent, like those contending that

other events spoil the conviction, must meet the statutory requirement of timely action.” *Id.* (citing *Escamilla v. Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005)).

The Court in *Perkins* agreed with the Sixth Circuit and rejected the Seventh Circuit’s approach. Its decision was grounded in the balance of “societal interests in finality, comity, and conservation of scarce judicial resources” with “the individual interest in justice that arises in the extraordinary case.” *Perkins*, 569 U.S. at 393. “Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA’s statute of limitations.” *Ibid.* In a first petition for federal habeas relief, a prisoner may invoke actual innocence to overcome procedural impediments to relief, including AEDPA’s statute of limitations. *Id.* at 397.

## **B. Factual background**

Petitioner Jason Lund participated in a large conspiracy to distribute heroin in the Milwaukee area. Pet. App. 2a. He was himself a heroin user. Pet. App. 29a. In June 2008, he bought heroin from his supplier for himself and Andrew Goetzke. *Ibid.* Goetzke died after using the heroin petitioner supplied. *Ibid.* A month later, petitioner again secured heroin from his supplier for himself, his ex-girlfriend Candice Haid, and David Knuth. *Ibid.* Knuth too died after using the heroin petitioner supplied. *Ibid.*

## **C. Proceedings below**

Petitioner was charged in a federal indictment with conspiring to distribute heroin. Pet. App. 2a. The indictment alleged that the conspiracy resulted in overdose

deaths of five individuals, including Goetzke and Knuth. *Ibid.* Petitioner pleaded guilty to participating in the conspiracy, but he denied responsibility for the deaths of Goetzke and Knuth. *Ibid.* The district court held him responsible nonetheless and sentenced him in accordance with the increased penalty under 21 U.S.C. §841(b)(1) that applies when a drug offense results in death. *Ibid.* The court of appeals affirmed in 2013. Pet. App. 54a. Petitioner’s conviction became final in October 2013. Pet. App. 2a.

The “death results” enhancement of §841(b)(1) was subject to competing interpretations in the courts of appeals at that time. The Seventh Circuit struggled to identify the minimum level of causation necessary. *Krieger v. United States*, 842 F.3d 490, 503–05 (7th Cir. 2016) (reviewing circuit law during time of petitioner’s conviction and sentence). This Court granted certiorari to resolve the causation question and in *Burrage v. United States* held that a defendant cannot be liable under §841(b)(1) for a decedent’s use of drugs “unless such use is a but-for cause of the death.” 571 U.S. 204, 218–19 (2014).

Petitioner filed a habeas petition under §2255 on February 1, 2016. Pet. App. 3a. In relevant part, petitioner alleged that his sentence was imposed in violation of §841(b)(1) as the Court had interpreted that statute in *Burrage*. Pet. App. 3a. The petition was late because it came more than a year after the conviction was final, §2255(f)(1), and more than a year after the Court decided *Burrage*, §2255(f)(3). The government moved to dismiss the petition as untimely, but petitioner maintained

that the court could rule on the merits because he was actually innocent under *Burrage*. Pet. App. 3a–4a.

The district court did not reach the merits or resolve whether petitioner was actually innocent. Instead, it held that petitioner could not make out a case of actual innocence by relying on an intervening change in law alone. Pet. App. 16a–20a. The “actual innocence exception” has never explicitly been approved of by the Seventh Circuit in “situations where a subsequent change to the scope of a law renders the conduct the petitioner was convicted for no longer criminal.” Pet. App. 5a. The district court thought it should not apply in those situations, so it denied the petition, but granted a certificate of appealability on the question. Pet. App. 22a–23a.

The Seventh Circuit did not address that question. It instead affirmed the denial of the petition on a ground neither party had briefed or supported. The court of appeals found that petitioner was “attempting to use *Burrage* as his claim for actual innocence and his claim for relief on the merits” and deemed that impermissible under AEDPA’s statute of limitations. Pet. App. 5a–9a. The court apparently understood a claim that petitioner’s sentence was imposed in violation of §841(b)(1) was the same as a claim that petitioner was actually innocent of the conduct proscribed by §841(b)(1). And §2255(f)(3) “prohibits prisoners from bringing habeas claims based on rights recognized by the Supreme Court ... more than one year after the right was recognized.” Pet. App. 8a.

What about *Perkins* and its holding that actual innocence is available to overcome AEDPA's statute of limitations on a first federal habeas petition? The Seventh Circuit seized upon language in *Perkins* rejecting the State's statutory arguments to find that *Perkins*'s holding did not apply to petitioner. Pet. App. 8a.

In *Perkins*, the State argued that other parts of AEDPA—28 U.S.C. §§2244(b)(2)(B) and 2254(e)(2), which deal with second or successive habeas petitions and the failure to develop claims in state court—proved that Congress incorporated the miscarriage of justice exception into only select parts of AEDPA. Congress' failure to mention the exception in §2244(d)(1)'s statute of limitations thus rendered it unavailable there. 569 U.S. at 395. The Court disagreed. Congress did not incorporate the exception into those other sections; rather, Congress “constrained the application of the exception” in §§2244(b)(2)(B) and 2254(e)(2) by requiring second-or-successive habeas petitioners to meet a higher level of proof and to satisfy a diligence requirement that did not exist before AEDPA. *Id.* at 395–96. So in a case not governed by those provisions, “*i.e.*, a first petition for federal habeas relief,” the miscarriage of justice exception “survived AEDPA’s passage intact and unrestricted.” *Id.* at 396–97.

The Court then turned to traditional equitable principles. Quoting *Holland v. Florida*, 560 U.S. 631, 646 (2010), the Court noted that it would “not construe a statute to displace courts’ traditional equitable authority absent the clearest command.” *Perkins*, 569 U.S. at 397. And the statute of limitations in §2244(d)(1) “contains no clear command countering the courts’ equitable authority to invoke the

miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition.” *Id.* at 397. So actual innocence may overcome a failure to adhere to AEDPA’s statute of limitations. *Id.* at 398.

The Seventh Circuit understood *Perkins* to identify just two of potentially many other provisions in AEDPA that modified the miscarriage of justice exception. Pet. App. 8a. “The Court noted, however, that other provisions of AEDPA did contain language modifying the actual innocence exception.” *Ibid.* And the Seventh Circuit concluded that the statute of limitations in §2255(f)(3)—even though it is materially identical to that in §2244(d)(1) (C)—was one of them. “There is a clear statutory command limiting courts’ equitable discretion to use the actual innocence gateway to excuse failure to comply with §2255(f)(3).” Pet. App. 8a. Petitioners must bring §2255 motions based on new rights recognized by the Supreme Court within one year, so they may not assert actual innocence after that time period by claiming that the same Supreme Court case made their conduct non-criminal. Pet. App. 8a–9a. As the Seventh Circuit put it long ago, “[p]risoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action.” *Escamilla v. Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005), *overruled by Perkins*, 569 U.S. at 391.

Petitioner filed a petition for rehearing and rehearing *en banc*, which was summarily denied. Pet. App. 25a.

## REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision fundamentally misapprehended this Court's decision in *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

The court affirmed the denial of petitioner's §2255 petition because it was untimely. Though petitioner pleaded actual innocence to overcome the timeliness rules, the court held that the statutory deadlines in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) could not be avoided through a plea of actual innocence. Under 28 U.S.C. §2255(f)(3), petitioner was required to challenge his sentence within a year of the Court's decision in *Burrage v. United States*, 571 U.S. 204 (2014). His actual innocence was irrelevant in light of the statutory deadline.

But this Court expressly rejected that understanding of AEDPA's statute of limitations in *Perkins*. "Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations." *Perkins*, 569 U.S. at 393. Thus, AEDPA's statute of limitations in 28 U.S.C. §2244(d) (which applies to federal habeas petitions filed by state prisoners) may be overcome by a showing of actual innocence. *Id.* at 397. AEDPA's statute of limitations in 28 U.S.C. §2255(f) (which applies to federal habeas petitions filed by federal prisoners) is materially identical to that in §2244(d). There is no room to hold, as the Seventh Circuit did, that federal habeas courts should be sensitive to the injustice of incarcerating an innocent *state* prisoner but cannot address the injustice of

incarcerating an innocent *federal* prisoner, when the impediment is the materially same statute of limitations. See *Perkins*, 569 U.S. at 393.

Summary reversal would allow the Court to clarify that AEDPA’s statute of limitations—be it in §2244(d) or §2255(f)—may be overcome by a showing of actual innocence while conserving its scarce resources. Given the sensitivity federal courts should afford to the injustice of incarcerating innocent persons, the Court’s guidance is needed so lower courts do not continue to embrace a view of AEDPA that this Court has explicitly rejected.

#### **I. This case merits summary reversal.**

Summary reversal is appropriate when “the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). This Court frequently uses its summary reversal procedure to correct lower court decisions that conflict with decisions of the Court. E.g., *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam); *Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016) (per curiam); *Presley v. Georgia*, 558 U.S. 209, 212–13 (2010) (per curiam).

*Lynch* provides a close analogue. Under this Court’s cases, a capital defendant is entitled to inform the jury of his parole ineligibility when his future dangerousness is at issue and the only sentencing alternative to death is life imprisonment without possibility of parole. *Lynch*, 136 S. Ct. at 1818. The facts there were undisputed; Lynch’s dangerousness was at issue, and the only alternative to the death penalty



was life without parole. *Id.* at 1818–19. Yet the lower court nonetheless concluded that Lynch was *not* entitled to inform the jury of his parole ineligibility. *Id.* at 1819. Because the error under this Court’s precedent was clear, the Court summarily reversed.

Under *Perkins*, AEDPA’s statute of limitations may be overcome through a plea of actual innocence. 569 U.S. at 397. The Seventh Circuit held that, for petitioner, AEDPA’s statute of limitations could *not* be overcome through a plea of actual innocence. The decision plainly contradicts this Court’s settled precedent. Summary reversal is appropriate. See *Lynch*, 136 S. Ct. at 1819.

The Seventh Circuit here hewed to the position it had taken in *Escamilla v. Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005)—“if not quite *in haec verba*, certainly in substance”—even though this Court overruled *Escamilla* in *Perkins*. Summary reversal is appropriate when a lower court continues to repeat the mistakes condemned by the Court. *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (Roberts, C.J., concurring). That is why, for example, the Court routinely vacates qualified-immunity decisions through summary dispositions when it has “repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (*per curiam*).

Summary reversal would allow the Court to correct the Seventh Circuit’s clear misapprehension of *Perkins* and to clarify that AEDPA’s statute of limitations may be overcome through a plea of actual innocence.

**II. AEDPA’s statute of limitations does not contain a “clear command” abrogating the traditional miscarriage-of-justice exception to procedural default in habeas cases.**

The Seventh Circuit found that actual innocence was unavailable to petitioner because §2255(f)(3) contains a “clear statutory command limiting courts’ equitable discretion to use the actual innocence gateway to excuse failure to comply with §2255(f)(3).” Pet. App. 8a. The court’s circular logic—the statute contains a clear command that the limitations period cannot be overcome, because the statute sets a limitations period—contradicts this Court’s explicit finding that AEDPA’s statute of limitations “contains *no* clear command” countering the courts’ equitable authority to invoke actual innocence. *Perkins*, 569 U.S. at 397 (emphasis added).

In *Perkins*, the Court acknowledged the traditional rule in habeas proceedings that a credible showing of actual innocence may allow a prisoner to proceed to the merits even in the presence of a procedural bar to relief. *Id.* at 392. The rule “is grounded in the ‘equitable discretion’ of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.” *Id.* The critical question in *Perkins* was whether that traditional “miscarriage of justice” exception survived the enactment of AEDPA. *Id.* at 393–94.

To a certain extent, this Court’s precedents already answered that question affirmatively. A federal court may, consistent with AEDPA, recall its mandate to revisit the merits of a decision. *Calderon v. Thompson*, 523 U.S. 538, 558 (1998). Actual innocence may overcome a federal prisoner’s failure to raise a constitutional

objection on direct review. *Bousley v. United States*, 523 U.S. 614, 622 (1998). So too for state prisoners who procedurally defaulted their claims. *House v. Bell*, 547 U.S. 518, 537–38 (2006). Each prior decision balanced society’s interest in finality, comity, and conservation of judicial resources with the individual interest in justice in extraordinary cases. *Perkins*, 569 U.S. at 393. So the answer to the question in *Perkins* was unsurprising: “Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA’s statute of limitations.” *Ibid.*

The “miscarriage of justice” exception applies to state procedural rules, including filing deadlines. *Ibid.* So it would be “passing strange to interpret a statute [AEDPA] seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States.” *Id.* at 394 (emphasis in original).

The State in *Perkins* made a textual argument: AEDPA’s statute of limitations “prescribes a comprehensive system for determining when its one-year limitations period begins to run,” so an equitable exception would “render superfluous this carefully scripted scheme.” *Id.* at 394–95. The Court rejected that argument. Many cases would satisfy the statutory criteria without a showing of actual innocence, so the statute as a whole would not be rendered superfluous by recognizing the actual innocence exception in certain cases. *Ibid.*

The State’s backup argument relied on the overall structure of AEDPA. *Id.* at 395. The Court surveyed the statutory scheme and found that Congress limited the miscarriage of justice exception in only two provisions—§§2244(b)(2)(B) and 2254(e)(2)—both of which constrain its application in second-or-successive petitions by requiring a higher level of proof and diligence. *Id.* at 395–96. The Court inferred that Congress, by not addressing actual innocence in other parts of AEDPA, did not intend to otherwise constrain the doctrine. “In a case not governed by [§§2244(b)(2)(B) and 2254(e)(2)], *i.e.*, a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA’s passage intact and unrestricted.” *Id.* at 397.

The Court refused to construe AEDPA to displace courts’ traditional equitable authority “absent the clearest command.” *Ibid.* And the text of AEDPA’s statute of limitations contains nothing, let alone a clear command, indicating that the actual innocence exception was displaced. *Ibid.*

*Perkins* involved a habeas petition filed by a state prisoner. The statute of limitations for such petitions is found in 28 U.S.C. §2244(d)(1). That text “contains no clear command countering the courts’ equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition.” *Ibid.* Section 2244(d)(1) sets a 1-year period of limitation for state prisoners to bring federal habeas claims. That period runs from the latest of four possible events, including two pertinent to this case. It may first run from

the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.

28 U.S.C. §2244(d)(1)(A). It may also run from

the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

28 U.S.C. §2244(d)(1)(C).

Federal prisoners are subject to materially the same limitations under 28 U.S.C. §2255(f). Again, a 1-year period of limitation applies to federal habeas petitions, running from the latest of four possible events, including two pertinent to this case. The period may first run from

the date on which the judgment of conviction becomes final.

28 U.S.C. §2255(f)(1). It may also run from

the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

28 U.S.C. §2255(f)(3). In the Seventh Circuit, a claim that a sentence was imposed in violation of *Burrage* satisfies the criteria of §2255(f)(3). *Krieger v. United States*, 842 F.3d 490, 504 (2016).

The Seventh Circuit's decision here plainly contradicts *Perkins*, which explicitly found that §2244(d)(1)'s text contains no clear command that the actual innocence exception did not survive AEDPA. Section 2255(f)'s text is materially identical to §2244(d)(1), and yet the Seventh Circuit found that text *does* contain a

clear command constraining the actual innocence exception. The Seventh Circuit's holding cannot be squared with *Perkins*.

The Seventh Circuit in essence adopted the State's losing argument about AEDPA's statutory scheme from *Perkins*. According to the Seventh Circuit, allowing a claim of actual innocence under *Burrage* would render the statute of limitation in §2255(f)(3) superfluous. Pet. App. 8a–9a. That argument was explicitly rejected in *Perkins*, 569 U.S. at 394–95. A prisoner sentenced before *Burrage* might easily show that his sentence was imposed “in violation of the ... laws of the United States,” 28 U.S.C. §2255(a), when the sentencing court imposed sentence under an interpretation of §841(b)(1) later repudiated in *Burrage*. That does not mean the sentence could not have been imposed under the correct standard; in other words, success under §2255(a) on the merits does not depend on a prisoner being actually innocent of the enhancement provision of §841(b)(1). Whether a sentence was imposed in violation of §841(b)(1) is a different question from whether a prisoner is actually innocent of the conduct proscribed by that statute. So the statute is not superfluous even with an actual innocence exception, as the Court explained. *Perkins*, 569 U.S. at 394–95.

The concerns undergirding the actual innocence doctrine “should not abate when the impediment is AEDPA's statute of limitations.” *Id.* at 393. The actual innocence doctrine thus “survived AEDPA's passage intact and unrestricted” in first petitions for federal habeas relief. *Id.* at 397. By holding otherwise, the Seventh Circuit misapprehended *Perkins* and created a rule that threatens to keep innocent

federal prisoners incarcerated if they fail to meet AEDPA's statute of limitations. That rule was expressly condemned in *Perkins*, so the Court should not allow it to stand.

## CONCLUSION

The Court should grant the petition for certiorari and summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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