No. 18-9719

IN THE
Supreme Court of the United States

JASON LUND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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Both parties agree on the law. "Actual innocence" excuses procedural default under 28 U.S.C. §2255, and it applies when a prisoner's conduct no longer fits within the statutory definition of the criminal offense. Pet. 3; BIO 7–8. The parties agree on the law because it is dictated by this Court's prior decisions. See *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013); *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Davis v. United States*, 417 U.S. 333, 346 (1974).

Neither the district court nor the court of appeals adhered to those prior decisions, though. The district court held that "actual innocence" does not apply when subsequent decisions of this Court clarify that a prisoner's conduct did not fit within the statutory definition of the offense, notwithstanding *Bousley*. Pet. App. 19a–20a. The court of appeals held that actual innocence does not excuse procedural default in some situations under §2255, notwithstanding *Perkins*. Pet. App. 7a–9a. For the reasons we have already given, Pet. 10–18, the lower courts' failure to adhere to this Court's precedent merits summary reversal.

The United States resists this conclusion by speculating about the likely result of a remand. It argues principally that petitioner was not actually innocent. BIO 8–10. Petitioner obviously disagrees, for the reasons he gave to the lower courts. The parties' disagreement has never been adjudicated by any court, though, because of the lower courts' erroneous views of the law. This Court should leave the resolution

of the parties' factual dispute to the lower courts in the first instance. *Pullman-Standard v. Swint*, 456 U.S. 273, 291–92 (1982).

The government also argues that petitioner cannot be actually innocent of the offense he was convicted of, because the district court departed from the minimum penalty for that offense. BIO 10–11. It contends that "it makes no difference" whether petitioner was innocent of the "death results" aggravated offense because he would have "been eligible to receive the same sentence" had he been convicted of a non-aggravating offense under 21 U.S.C. §841. That argument misunderstands both the law and the facts of the case.

The "death results" enhancement is not a sentencing factor; it is an element of an aggravated offense under §841. *Burrage v. United States*, 571 U.S. 204, 210 (2014). The minimum penalty for that aggravated offense is a prison term of 20 years. See 21 U.S.C. §841(b)(1)(C). The district court may impose a sentence below that floor to reflect a defendant's substantial assistance to the government. 18 U.S.C. §3553(e). But its discretion is constrained: the sentencing judge must begin with the term of 20 years, and any departure from that term must be based only on the defendant's substantial assistance. See *Koons v. United States*, 138 S. Ct. 1783, 1787–89 (2018). In addition, the U.S. Sentencing Guidelines prescribe an enhanced offense level for defendants convicted of the "death results" aggravated offense. U.S.S.G. §2D1.1(a)(2).

Petitioner's sentence was based on his conviction for the aggravated "death results" offense in §841(b)(1)(C). Though the district court imposed a sentence below

the 20-year floor, the sentence was enhanced by the aggravated offense and reflects a departure only for substantial assistance. Pet. App. 32a. Had petitioner not been convicted of the aggravated offense, neither the enhanced mandatory minimum nor the enhanced offense level under the Guidelines would have applied to him. Whether he was innocent of the aggravated offense makes a significant difference. Cf. *Peugh v. United States*, 569 U.S. 530, 544 (2013). He almost certainly would no longer be in prison had he not been convicted under the "death results" enhancement.

All but conceding that the court of appeals erred, the United States finally counsels the Court to deny certiorari because it "reviews judgments, not opinions." BIO 12 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)). But leaving in place the court of appeals' judgment would let stand a precedential decision governing federal district courts in three states that resolves a legal question in direct contradiction to this Court's decision in *Perkins*. Certiorari should be granted to avoid such nonuniformity in the law. *Mincey v. Arizona*, 437 U.S. 385, 403 (1978) (Marshall, J., concurring). The Court in *Chevron* did not let the "basic legal error" of the court of appeals stand; to the contrary, it granted certiorari and agreed that the court had erred. It should do the same here.

The United States does not offer any support for the Seventh Circuit's legal error. While *Chevron* involved a question of law that the Court could resolve itself, the primary dispute left in this case concerns petitioner's actual innocence. Questions of fact should not be decided by this Court in the first instance. The Court should

reverse the judgment of the court of appeals and remand for resolution of whether petitioner has made a sufficient showing of actual innocence to proceed under §2255.

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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