

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEVARON ANTOINE LOVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a movant under 28 U.S.C. § 2255 can show actual innocence to overcome a procedural default where he can show, based on a new decision from this Court, that his prior conduct was not unlawful.

LIST OF RELATED CASES

1. *Love v. United States*, Case No. 5:17-cv-8008-RDP, U.S. District Court for the Northern District of Alabama. Memorandum Opinion and Order denying 28 U.S.C. § 2255 motion on March 9, 2020.
2. *Love v. United States*, No. 20-11767, U.S. Court of Appeals for the Eleventh Circuit. Order denying a certificate of appealability on August 3, 2020. Order denying reconsideration on September 3, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Devaron Antoine Love respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The district court's memorandum opinion and order denying Mr. Love's 28 U.S.C. § 2255 motion are unpublished, and appear at Appendix A to the Petition.

The Eleventh Circuit's decision denying Mr. Love's motion for a certificate of appealability is unpublished, and appears at Appendix B to the Petition. The order denying reconsideration is unpublished and appears at Appendix C to the Petition.

JURISDICTION

The Eleventh Circuit denied Mr. Love a certificate of appealability on August 3, 2020. Mr. Love timely filed a motion for reconsideration, which the Eleventh

Circuit denied on September 3, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely filed in accordance with Sup. Ct. R. 13.

The district court had original subject matter jurisdiction under 28 U.S.C. § 2255. The Eleventh Circuit had appellate jurisdiction under 28 U.S.C. § 1291.

PROVISIONS INVOLVED

Section 2255(a) of Title 28 of the United States Code provides in relevant part that:

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.

Section 924(c) of Title 18 of the United States Code provides in relevant part that:

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

[...]

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;

[...]

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

1. Federal Criminal Conviction and Sentence

In 2015, Mr. Love pleaded guilty to two offenses: aiding and abetting the burglary of a pharmacy, in violation of 18 U.S.C. § 2118(b) and (c)(1) and 18 U.S.C. § 2(a), and aiding and abetting the brandishment of a firearm, in violation of 18 U.S.C. § 924(c) and 18 U.S.C. § 2(a). A person commits pharmacy burglary by, without authority, entering or remaining in a pharmacy with the intent to steal any material or compound containing a controlled substance. 18 U.S.C. § 2118(b). If a person “assaults any person, or puts in jeopardy the life of any person, by the use of a dangerous weapon or device” during the burglary, the penalty increases. 18 U.S.C. § 2118(c). Section 924(c) provides for additional, consecutive penalties where a firearm is brandished during a “crime of violence.” That term is defined as a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” (the “force clause”), or “by its nature, involves a substantial risk of physical force against the person or property of another may be used in committing the offense,” (the “residual clause”). 18 U.S.C. § 924(c)(3).

The district court sentenced Mr. Love to 30 months’ imprisonment as to Count 1, and the mandatory 84 months’ imprisonment on Count 2, for a total of 114 months’ imprisonment. He is currently serving that sentence.

2. Mr. Love’s Motion to Vacate under 28 U.S.C. § 2255

In 2017, Mr. Love timely moved, under 28 U.S.C. § 2255, to vacate his conviction and sentence for the § 924(c) count, alleging that it was no longer valid following *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, this Court struck down as unconstitutionally vague the “residual clause” of the Armed Career Criminal Act, 18 U.S.C. § 924(e), which provided that a person could receive an enhanced sentence, in part, if they had prior convictions that “otherwise involve[d] conduct that presents a serious potential risk of physical injury to the person of another.” *Id.* at 2563. Mr. Love argued that the reasoning in *Johnson* showed that § 924(c)’s similarly worded residual clause was likewise unconstitutionally vague. In the absence of the residual clause, he argued, his conviction for pharmacy burglary did not qualify as a crime of violence, as it did not include an element of force. Thus, he argued that his § 924(c) conviction and resulting 84-month sentence was invalid and should be vacated.

While Mr. Love’s § 2255 motion was pending, this Court held that § 924(c)’s residual clause was likewise unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319 (2019). Thus, for a conviction to qualify as a crime of violence under § 924(c), it must qualify under the force clause of § 924(c)(3). The conviction must have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” § 924(c)(3).

The government responded that Mr. Love’s claim was procedurally defaulted because he had not raised it on direct appeal and that nonetheless his claim failed on

the merits. Mr. Love replied that his claim was not procedurally defaulted because he is actually innocent of the § 924(c) conviction since his pharmacy burglary conviction did not qualify as a violent felony under the force clause of § 924(c)(3).

The district court denied Mr. Love's § 2255 motion, determining that: (1) he had procedurally defaulted his challenge to the § 924(c) conviction by failing to raise it on direct appeal; and alternatively (2) that his claim failed on the merits because his convictions would qualify as crimes of violence under § 924(c)'s still-valid force clause. The district court further denied Mr. Love's request for a certificate of appealability ("COA").

3. The Eleventh Circuit's Denial of a COA

The Eleventh Circuit also denied Mr. Love a COA. The Court did not address the merits of Mr. Love's claim that his pharmacy burglary conviction no longer qualified as a crime of violence under § 924(c). Instead, the Court found that the claim was procedurally barred by rejecting Mr. Love's assertion that he was actually innocent of the § 924(c) count. The Court stated only that "he has presented no new, reliable evidence that he is *factually* innocent of the crime, and, instead, attempts to argue that he is *legally* innocent." Appendix B at 2 (emphasis added). Mr. Love pressed the issue in a motion to reconsider, which the Court summarily denied.

REASONS FOR GRANTING THE PETITION

- I. This case provides an ideal vehicle to resolve a potential circuit split over whether a § 2255 movant can establish “actual innocence” to prevent a procedural default where he can show, based on a new decision from this Court, that his prior conduct was not unlawful.**

The Eleventh Circuit’s holding—that Mr. Love’s claim that the predicate underlying his § 924(c) conviction no longer qualifies as a crime of violence cannot establish actual innocence—diverges from other Circuits that recognize that a § 2255 movant can establish “actual innocence” to prevent a procedural default by showing, based on a new decision from this Court, that his prior conduct was not unlawful. The question is an important one. The “actual innocence” exception is based on the recognition that if one’s “conviction and punishment are for an act that the law does not make criminal,” then “[t]here can be no room for doubt that such a circumstance ‘inherently results in a complete miscarriage of justice’ and ‘present[s] exceptional circumstances’ that justify collateral relief under § 2255.” *Davis v. United States*, 417 U.S. 333, 346-47 (1974). However, under the Eleventh Circuit’s interpretation of actual innocence, a person could remain convicted and imprisoned, regardless of whether his conduct falls within the scope of a criminal statute.

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) limits the types of claims for a collateral challenge. One limitation is that a § 2255 movant who failed to raise a claim on direct appeal has defaulted that claim. *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). However, that general rule is subject to several exceptions, including actual innocence. See *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (A “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.”). The actual innocence rule, also known as the “fundamental miscarriage of justice exception,” “is grounded in the ‘equitable discretion’ of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.” *McQuiggin*, 569 U.S. at 392 (citation omitted). As this Court observed “[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment” is a procedural requirement created by the AEDPA. *Id.* at 393.

To establish actual innocence of a count of conviction, the movant must demonstrate that “in light of all the evidence,” “it is more likely than not that no reasonable juror would have convicted him.” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (internal quotation marks omitted)). In *Bousley*, this Court held that a movant could establish actual innocence following a decision narrowing what conduct constituted the “use” of a firearm under § 924(c). *Id.* at 623-24. Thus, contrary to the Eleventh Circuit’s holding, this Court’s precedent shows that an actual innocence claim may be predicated on a change in the law. This Court did differentiate factual innocence from mere legal innocence, but made the distinction to explain that “the Government is not limited to the existing record to rebut any showing that the petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner’s guilt even if that guilt was not presented during petitioner’s plea colloquy. . . .” *Id.* at 623-24. Thus, this Court’s distinction between factual and legal innocence

was to show that the government was not limited in the evidence it could present on remand. Mr. Love’s claim fits within this Court’s actual innocence framework, as he argues that the government can no longer establish an element of the § 924(c) conviction, such that it is more likely than not that no reasonable juror would have convicted him.

Indeed, the Eleventh Circuit’s determination that Mr. Love’s claim is of merely legal, not actual, innocence sets up a split among the federal courts of appeal. Other appellate courts have routinely recognized that the actual innocence showing can be made when an intervening change in the law establishes that a petitioner has been “convicted for conduct not prohibited by law.” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011); *see also United States v. Adams*, 814 F.3d 178, 183 (4th Cir. 2016) (petitioner was actually innocent of his felon-in-possession conviction because intervening Fourth Circuit precedent established that he was no longer a felon); *Phillips v. United States*, 734 F.3d 573, 582 (6th Cir. 2013) (“One way to establish factual innocence is to show an intervening change in the law that establishes the petitioner’s actual innocence.”) (internal quotation marks and citation omitted); *United States v. Tyler*, 732 F.3d 241, 246 (3rd Cir. 2014) (“A petitioner can establish that no reasonable juror would have convicted him by demonstrating an intervening change in law that rendered his conduct non-criminal.”); *Reyes-Quenena v. United States*, 243 F.3d 893, 903 (5th Cir. 2001) (“Courts have framed the actual

innocence factor differently, but the core idea is that the petitioner may have been imprisoned for conduct that was not prohibited by law.”).¹

Mr. Love’s *Davis*-based claim is particularly analogous to *United States v. Adams*, 814 F.3d 178, 183 (4th Cir. 2016). In that case, Mr. Adams argued that in light of intervening Fourth Circuit precedent, he was actually innocent of his conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), and should be allowed to withdraw his plea. *Id.* at 183. He claimed that under *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) — which held that certain North Carolina convictions do not qualify as “felonies” under § 922(g) — none of his prior convictions qualified as “felonies.” *Id.* Thus, he asserted, the “felon” element of § 922(g) could no longer be satisfied, and hence, he was actually innocent. *Id.* The government made an argument similar to the Eleventh Circuit’s reasoning here—that “although Adams may no longer be legally convicted of a violation of § 922(g) after *Simmons*, he remains, nonetheless, [] still factually guilty.” *Id.* at 183. The Fourth Circuit rejected that claim, concluding that Mr. Adams had established “factual innocence” as contemplated by *Bousley*, “because he has shown that it is

¹ These cases address the concept of “actual innocence” in different contexts, such as in overcoming a procedural bar to a § 2255 claim or seeking to raise a claim under 28 U.S.C. § 2241. However, the analysis in each of these contexts is relevant here because “Whether analyzed as an equitable exception to an untimely or procedurally defaulted § 2255 claim or as a § 2241 claim via § 2255’s savings clause, the actual innocence exception asks the same fundamental question: does the petitioner stand convicted of conduct that the law does not make criminal, either because of credible evidentiary proof that he did not commit the crime or because the law has rendered his conduct not criminal.” *Phillips v. United States*, 734 F.3d 573, 582 n.9 (6th Cir. 2013).

impossible for the government to prove one of the required elements of a § 922(g)(1) charge – that the defendant was a convicted felon at the time of the offense. This is so because [in light of *Simmons*] Adams was ‘in fact’ not a felon.” *Id.*

Likewise, Mr. Love is factually innocent of the § 924(c) offense of which he was convicted. A required element of the offense is the commission of a “crime of violence.” 18 U.S.C. § 924(c)(3)(B). Before *Davis*, a “crime of violence” was defined as a felony offense that—“has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” (the force clause) or “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (the residual clause). 18 U.S.C. § 924(c)(3). *Davis* struck down the residual clause as unconstitutionally vague. 139 S. Ct. at 2336. Thus, for an offense to qualify as a “crime of violence” following *Davis*, it must have an element of force. Mr. Love’s predicate offense, pharmacy burglary, does not require an element of force and therefore, no longer qualifies as a crime of violence. Because there is no “crime of violence” in Mr. Love’s case, “it is impossible for the government to prove one of the required elements” of § 924(c) – the “crime of violence” element. *Adams*, 814 F.3d at 183.

The Eleventh Circuit’s denial of a COA based on the characterization of Mr. Love’s claim as legal innocence rather than factual, sets it apart from other appellate courts. And permitting the Eleventh Circuit’s rationale to stand would run afoul of

the key reason that the actual innocence exists—to preclude the imprisonment of a person who has not committed an offense under criminal law.

II. This case is an ideal vehicle to resolve the question presented because Mr. Love is not guilty of violating § 924(c) following *Davis*.

Following this Court’s decision in *Davis*, a “crime of violence” under 18 U.S.C. § 924(c) is a felony offense that involves the use, attempted use, or threatened use of physical force against the person or property of another. The “use” of force refers to the active use of force. *See Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004) (holding under the essentially identical definition of crime of violence in 18 U.S.C. § 16, that the “use of force against the person or property of another” requires the active employment of force). Thus, the unintentional or negligent use of force would not qualify as sufficient under § 924(c). *See id.*

To determine whether an offense qualifies as a crime of violence under § 924(c), courts rely on the categorical approach. *Davis*, 139 S. Ct. at 2327. Under the categorical approach, courts look only at the elements of a defendant’s offense, not the particular underlying facts of the case, to determine whether an offense qualifies as a crime of violence. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). In applying the categorical approach, a court must presume that the offense was committed in the least culpable manner.

a. The basic offense of pharmacy burglary does not qualify as a crime of violence under § 924(c)’s force clause.

First, the basic offense of burglary of a pharmacy, § 2118(b), does not qualify as a crime of violence. On its face, the statute clearly does not require the use of force

against the person of another, as it does not explicitly or implicitly refer to any action involving another person. *See* 18 U.S.C. § 2118(b). Instead, it requires only that a person: “without authority, enters or attempts to enter, or remains in, the business premises or property of a person registered with the Drug Enforcement Administration . . . with the intent to steal any material or compound containing any quantity of a controlled substance.” 18 U.S.C. § 2118(b). Moreover, because the least force required by the statute is merely entering or remaining in a business without authority and with intent to steal, it does not require active force against property. Thus, as identified by the statute, a violation of § 2118(b) can be accomplished without the use of force. Burglary of a pharmacy categorically fails to satisfy § 924(c)’s force clause.

b. The enhancement provision under 18 U.S.C. § 2118(c) does not require the active use of physical force.

The enhancement provision under § 2118(c) does not elevate burglary of a pharmacy to a crime of violence because the least culpable conduct that violates § 2118(c)(1) does not satisfy the force clause. Under the categorical approach, courts must look to the least culpable conduct penalized by a statute to determine whether a conviction qualifies as a crime of violence. *Moncrieffe v Holder*, 569 U.S. 184, 190-91 (2013). Here, the least culpable conduct is burglary of a pharmacy in which the use of a dangerous weapon puts in jeopardy the life of any person. This jeopardy clause focuses on the risk to a victim, not the defendant’s actions. Thus, a defendant could violate § 2118(c) without the active use of force, which is required to qualify as “force” for the purpose of a crime of violence.

A defendant can use a dangerous weapon in the course of committing a burglary without the active use of force. For example, a person fleeing a robbery could unintentionally strike a police car because he was speeding and driving recklessly. *See United States v. Mills*, 1 F.3d 414, 420 (6th Cir. 1993) (upholding conviction under § 2118(c) where defendants struck police car while fleeing, because evidence of intent was not required because the jury could have determined that the defendant's reckless driving and speed put the officer's life in danger). That conduct does not satisfy the force clause because unintentional actions, even when dangerous, do not constitute active use of force. *See Leocal*, 543 U.S. at 9-10.

Because it does not categorically have “as an element the use, attempted use, or threatened use of physical force against the person or property of another,” Mr. Love’s pharmacy burglary conviction does not qualify as a crime of violence under the force clause. 18 U.S.C. § 924(c)(3)(A). As such, the government cannot establish an element of the § 924(c) offense, and Mr. Love is actually innocent of that offense. Thus, this case is ideal for review by this Court because, absent the Eleventh Circuit’s error, he should be eligible for relief.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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