No. 20-8016

IN THE
Supreme Court of the United States

RICO BLACKWELL,

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

Mr. Blackwell sits in a federal prison convicted for an act that is not a crime. What should a court do about that jarring fact? Nothing, says the government. It insists that Mr. Blackwell must stay in prison anyway because, first, he is not "actually innocent" and, second, he bargained away the right to challenge this phantom conviction. The government is doubly wrong.

A. The procedural default question is the subject of a concrete circuit split (with the Eleventh Circuit in the minority), because a *Davis* claim simply a variation on the *Johnson* melody.

The government insists that there is no circuit split on the *Davis* procedural default question, but that is true only if we divorce the *Johnson* issue from the *Davis* issue. We cannot—the two questions are merely the same wine in different bottles. What's good for *Johnson* is good for *Davis*.

The government attempts to deflect the effect of the circuit split this way:

> Petitioner maintains that four circuits have found a *Davis* claim sufficiently novel to demonstrate cause to excuse a procedural default. But three of those cases pre-date *Davis* and address distinct challenges to the ACCA's residual clause under *Johnson*, or else to sentences under the federal Sentencing Guidelines before *United States v. Booker*, 543 U.S. 220 (2005). . . . Those cases therefore do not address

> whether the reasoning in *Davis* was sufficiently novel to excuse a procedural default.[1]

We noted those very factual differences in our petition, but we argued there, as we do here, that any circuit opinion measuring the intersection between *Johnson* and procedural default is functionally equivalent to the *Davis* inquiry here.[2] The government strives mightily to distance itself from the *Johnson*-based opinions because unless it can do so, the weight of authority is firmly against it. But that is a losing game.

A *Davis* claim is no different than a *Johnson* claim. Authority in one context is freely transferrable to the other. With that baseline in place, a *Davis* movant, like Mr. Blackwell, stands in the same shoes as the *Johnson* movants in other circuits, circuits that share our view that the procedural default defense must fall away here.

The Eleventh Circuit is an outlier. Indeed, even in *Granda v. United States*, that court's principal opinion on this topic, the procedural-default issue was controversial. Judge Adalberto Jordan expressly chose not to sign that portion of the opinion.[3]

A residual clause is a residual clause is a residual clause. And that is why *Davis* is simply *Johnson* by another name.

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[1] *Brief for the United States in Opposition* at 9.

[2] *Petition for Writ of Certiorari by Rico Blackwell* at 11-15.

[3] 990 F.3d 1272, 1296 (11th Cir. 2021) (Jordan, J., concurring).

The Eleventh Circuit itself said so in the wake of *Davis*: "As we have already explained, by striking down § 924(c)(3)(B)'s residual clause, *Davis* altered the range of conduct and the class of persons that the § 924(c) statute can punish in the same manner that *Johnson* affected the ACCA."[4] Indeed. This Court said as much, too, in *Davis*.[5]

The *Davis* holding is a direct descendent of *Johnson*. If an ACCA residual-claim was a "novel" bolt of lightning from a clear blue sky worthy of a procedural-default exemption, then so too are challenges to parallel residual clauses, including § 924(c)'s. That is why the several circuit opinions allowing a *Johnson* movant to avoid procedural default apply just as well to a *Davis* movant.[6] The Eleventh Circuit, by resolving the question for the first time in a *Davis* motion, rather than in a *Johnson* motion, simply arrived late to the party. But it is the same party. And the stark

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[4] *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019) (holding that *Davis* is retroactive to cases on collateral review).

[5] The *Davis* majority noted that "[i]n recent years, this Court has applied these principles to two statutes that bear more than a passing resemblance to § 924(c)(3)(B)'s residual clause." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (citing *Johnson v. United States*, 135 S. Ct. 2551, 2558-2559 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018)).

[6] None of the three or four circuits have declared since *Davis* that the procedural-default outcome ought to be different than it was in the *Johnson* context.

difference of opinion among the circuits is ripe for this Court's intervention.

B. Mr. Blackwell fits within the *Bousley* actual-innocence test because the counts dismissed in exchange for his long-ago plea agreement were not "more serious" than the counts of conviction.

Mr. Blackwell's *Davis* claim, although it is procedurally defaulted, survives not only because he showed both cause and prejudice, but also because he is actually innocent of the § 924(c) crime. The government is wrong to say otherwise.[7] The government concedes that this Court has "suggested a narrow alternative option authorizing a court to excuse a procedural default if the prisoner can show that he is 'actually innocent' of the underlying offense. *Bousley v. United States*."[8] Yes, it has, just as we narrated in our petition.

In *Bousley*, this Court declared that "[i]n cases where the government has forgone *more serious charges* in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges."[9] The government's actual-innocence argument goes awry because it assumes a critical mistake of fact. It claims that in the district court, it dismissed "more serious" crimes in exchange for Mr. Blackwell's guilty plea to the 18 U.S.C.

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[7] *Brief for the United States in Opposition* at 9.

[8] *Brief for the United States in Opposition* at 8.

[9] 523 U.S. 614, 624 (1998) (emphasis added).

§ 371 conspiracy and companion § 924(c) offense.[10] Yet that simply is not true.

During plea negotiations, the government dismissed one crime—armed bank robbery—in exchange for a plea to the § 371 conspiracy. (The government also traded out one § 924(c) count based on the bank robbery for another based instead on the § 371 conspiracy.) The government says the dismissed crimes are "more serious" than the convicted crimes simply because bank robbery carries a higher statutory maximum sentence (25 years) than the § 371 conspiracy (five years).

Yet why must we measure the term "more serious charges" solely through the lens of the statutory maximum? The government does not say. This Court in *Bousley* did endorse such a narrow definition. Yes, the dismissed crime here carries a higher potential sentence than the § 371 conspiracy, but the statutory maximum here is artificial and played no role in Mr. Blackwell's case.

In practical terms, the dismissed count was merely *equally* serious. An armed bank robbery carries the same mandatory minimum sentence (no prison time at all) as a § 371 conspiracy.[11] What's more, the crime of armed bank robbery carried the same sentencing guideline range as the § 371 conspiracy. Indeed, the sentencing guidelines, through a cross reference, required the district court to apply the range from the substantive offense to the § 371 conspiracy count. Mr. Blackwell's advisory range (one

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[10] *Brief for the United States in Opposition* at 9-10.

[11] *Compare* 18 U.S.C. § 371 *to* 18 U.S.C. § 2113(a), (d).

based entirely on the dismissed armed bank robbery count) was 57-71 months in prison. The court imposed a term of 54 months, just below the low end, and it did so upon the government's recommendation. It mattered not, in the end, whether Mr. Blackwell was convicted of the bank robbery offense dismissed by the government or the § 371 conspiracy. There was no practical difference in the severity—or "seriousness"—of the two crimes.[12]

It is a fiction to say that Mr. Blackwell avoided "more serious charges" in exchange for his guilty plea to the § 371 conspiracy. The bank robbery charge was merely equivalent to, but not more serious than, the crime to which Mr. Blackwell pled guilty. That means we need not show that he is actually innocent of those collateral crimes after all. Even under *Bousley*, then, Mr. Blackwell is actually innocent of the § 924(c) crime (one based on conspiracy) and merits relief.

C. This case is an ideal vehicle to allow this Court to resolve the confusion in the lower courts on not one, but two, recurring and important questions.

The government insists "this case would be a poor vehicle to address the effect of petitioner's collateral attack waiver, because that issue alone is not outcome

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[12] The same holds true for the § 924(c) crimes. The version in the original indictment (based on armed bank robbery) is equally serious to the substituted version (based on the § 371 conspiracy). The punishment for both would have been identical: seven years in prison. 18 U.S.C. § 924(c)(1)(a)(ii). No more and no less.

determinative here."[13] Yet that is only true if we lose the procedural-default (actual-innocence) question. But we shouldn't, as we say above.

Both the government's defenses—procedural default and collateral-attack-waiver—must fall away here in this case, and in countless other cases around the country, because *Davis* renders Mr. Blackwell's § 924(c) conviction unlawful. That is precisely why this case is a strong vehicle. This Court may resolve not one, but two, questions that have bedeviled lower courts from the moment *Johnson* arrived through today. Six years is long enough.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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[13] *Brief for the United States in Opposition* at 12.