No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHAD EUGENE CALDWELL,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION PRESENTED

Petitioner Chad Caldwell was sentenced to 272 months in prison based on the district court's conclusion that he was a career offender under USSG §4B1.2. At the time, the guidelines were mandatory, and this was the minimum sentence the court was allowed to give. Years later, he moved to vacate his sentence under 28 U.S.C. § 2255, arguing that he was wrongly sentenced as a career offender. He claimed that the late filing should be excused because he was actually innocent of the mandatory sentencing enhancement he was challenging. The Tenth Circuit held that this exception did not apply because an offender "cannot be actually innocent of a noncapital sentence." The majority of circuits have taken a contrary view. This court should grant certiorari to resolve the circuit split on this question:

Does the actual innocence exception apply to a noncapital sentence?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Chad Caldwell respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished decision is available at 2021 WL 4911064 and is included in the appendix at A2. The district court's written ruling on the § 2255 motion is at A6.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on October 21, 2021. On January 19, 2020, this court extended the filing deadline to March 18, 2022. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal law provides that motions to vacate a federal sentence must be filed within one year of "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).

STATEMENT OF THE CASE

I. Conviction and Sentencing

Mr. Caldwell pleaded guilty on October 9, 2003, to armed bank robbery in violation of 18 U.S.C. § 2113 and 18 U.S.C. § 924(c). Prior to sentencing, the presentence report (PSR) designated him as a career offender under USSG §4B1.2. As a result of this enhancement, Mr. Caldwell faced a guideline range of 188-235 months, in addition to a 7-year mandatory minimum for § 924(c). Because the guidelines were mandatory at this time, the court could not legally impose a sentence lower than 272 months. And that's exactly what the court did on December 22, 2003. Mr. Caldwell did not appeal.

II. Post-conviction Proceedings

Years later, Mr. Caldwell filed a motion for relief under 28 U.S.C. § 2255. In that petition, he argued that his designation as a career offender could have been imposed only under the residual clause of mandatory guidelines, thus violating due process. Specifically, he argued that California burglary did not categorically require the use of force and did not fit categorically within the list of enumerated offenses in USSG §4B1.2, so he was guilty of being a career offender only under the unconstitutional residual clause of mandatory guidelines.

The government never argued that Mr. Caldwell was properly punished as a career offender under §4B1.2. Instead, it moved to dismiss Mr. Caldwell's petition

on the ground that it was untimely. Mr. Caldwell replied that the untimely petition should be excused because he was "actually innocent" of being a career offender. The district court dismissed the petition as untimely and denied a certificate of appealability (COA).

On appeal, Mr. Caldwell renewed his claim that the late filing should be excused because he was "actually innocent" of the mandatory career offender enhancement. The Tenth Circuit rejected this argument and affirmed the dismissal. Its rationale was succinct: the actual innocence exception did not apply because a defendant "cannot be actually innocent of a noncapital sentence." App. A4 (quoting *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993)). However, it noted that at least one circuit had taken an opposing view. *Id.* (citing *Jones v. Arkansas*, 929 F.2d 375, 381 (8th Cir. 1991)).

REASONS FOR GRANTING THE WRIT

The circuits are split on whether a person can be actually innocent of a mandatory sentencing enhancement. This question is important because many offenders in state and federal courts have been sentenced to long sentences that the judge did not have discretion to reduce at the time of sentencing. If it later becomes clear that a mandatory sentence did not apply, whether by the discovery of new facts or a change in the law, a defendant should be allowed to seek relief from the illegal sentence, regardless of how long it has been since it was imposed. A contrary rule

would undermine the integrity of the federal judicial system by preventing those who are incarcerated under a mandatory sentencing enhancement that doesn't actually apply from seeking relief from that illegal sentence. The Court should grant certiorari to preserve the integrity of the federal judicial system and to resolve the circuit split on this issue.

I. The circuits are split on whether a defendant can be "actually innocent" of a noncapital sentencing enhancement.

Supreme Court review is necessary to clarify whether a defendant can be actually innocent of a mandatory sentencing enhancement. Actual innocence is an important aspect of post-conviction review because this Court has held that "a plea of actual innocence can overcome AEDPA's one-year statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). The reason for this rule is that "by refusing to consider the petition for untimeliness, the court thereby would endorse a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned." *Id.* at 391 (quoting *San Martin v. McNeil*, 633 F.3d 1257, 1267-1268 (11th Cir. 2011).

Prior to *McQuiggin*, this Court had held that a claim of actual innocence was a proper basis for hearing a second or successive habeas petition that otherwise would be barred. *Kuhlmann v. Wilson*, 477 U.S. 436, 448 (1986), *superseded by statute as stated in Banister v. Davis*, 140 S.Ct. 1698 (2020). It was also a basis for overcoming procedural default. *Murray v. Carrier*, 477 U.S. 478, 496-97 (1986).

While these cases address circumstances where the petitioner claimed he was innocent of committing the crime, this Court subsequently expanded this exception to the sentencing context. *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992), held that a defendant can be actually innocent of a capital sentence. This Court explained it in this way: "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.* at 345. Under this exception, the "focus" would be "on those elements that render a defendant eligible for the death penalty." *Id.* at 347. Thus, if a petitioner who could establish that some element of a capital punishment did not actually apply, he could invoke the actual innocence exception to get around procedural bars that would otherwise preclude relief.

The question now is whether this analysis applies in noncapital sentences that are similarly imposed as the result of a post-verdict or post-plea finding. This Court has not yet spoken on this issue. *Dretke v. Haley*, 541 U.S. 386, 393 (2004).

Several circuits, however, have held said that a defendant can be actually innocent of a noncapital sentence. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 171 (2d Cir.2000) (holding that the actual innocence exception applies to a sentencing enhancement in a noncapital sentence); *United States v. Maybeck*, 23 F.3d 888, 893–94 (4th Cir.1994) (reasoning that application of the actual

innocence exception to the aggravating factors of a capital sentencing case is functionally equivalent to applying the exception to aggravating factors enhancing a noncapital sentence under the guidelines); *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999) (holding that "actual innocence applies in non-capital sentencing," although "only in the context of eligibility for application of a career offender or other habitual offender guideline provision"); *Haley v. Cockrell*, 306 F.3d 257, 264–66 (5th Cir. 2002), *vacated on other grounds* 541 U.S. at 388–89; *Allen v. Ives*, 950 F.3d 1184, 1189 (9th Cir. 2020) (actual innocence of a noncapital sentence satisfies the "escape hatch" of 28 U.S.C. § 2241); *see also Mills v. Jordan*, 979 F.2d 1273, 1279 (7th Cir.1992) ("[A]ctual innocence exception applies to habitual offender proceedings . . . whether or not they involve the possibility of capital punishment"), *abrogated by statute as recognized by Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997).; *Jones v. Ark.*, 929 F.2d 375, 381 (8th Cir. 1991) (actual innocence of a noncapital sentence is a basis for overcoming procedural default).

The rationale of these cases makes sense. Like the elements the state must establish at the penalty phase of a capital case, a wide variety of laws impose requirements that must be met to impose a noncapital prison sentence. If those requirements turn out not to have been met, even if it is long after the sentence was imposed, it would be a miscarriage of justice to require a defendant to remain in prison.

As the Second Circuit explained in *Spence*, "[i]n the context of capital sentencing, the [Supreme] Court has clarified that the exception exists . . . to show that the defendant was actually ineligible for (i.e., actually innocent of), the death penalty under state law." 219 F.3d at 171. The miscarriage of justice exception is grounded on the premise that habeas review is critical for correcting a fundamentally unjust incarceration. *Id.* "Because the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Id.*

Most recently, the Ninth Circuit has taken a similar approach for a federal petitioner who was wrongly sentenced as a career offender under mandatory guidelines. In *Allen v. Ives*, 950 F.3d 1184 (2020), the petitioner sought postconviction relief from his career offender sentence that was imposed under mandatory guidelines. At issue was whether he qualified for the "escape hatch" of 28 U.S.C. § 225(e). To qualify for this exception, he had to "make[] a claim of actual innocence." *Id.* at 1188. He argued that he was innocent of being a career offender because one of his prior convictions did not qualify categorically under §4B1.2 after *Mathis v. United States*, 136 S.Ct. 2243 (2016). The Ninth Circuit agreed. If the petitioner's prior criminal record did not qualify categorically as a predicate offense under USSG §4B1.2 when the Guidelines were mandatory, "he is 'actually innocent of a noncapital

sentence for the purpose of qualifying for the escape hatch.'" *Id.* at 1190 (quoting *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012).

It does not matter that *Allen* was considering the applicability of § 2241's "escape hatch" because the condition for relying on that provision is the same as the condition for raising an untimely claim: actual innocence. *Allen*, like the other cases discussed here, holds that a defendant sentenced as a habitual offender under mandatory guidelines can be factually innocent of that sentence. Simply put, "the factual predicate for his mandatory sentencing enhancement did not exist. That is, he is actually innocent of the enhancement. In that case, it is beyond dispute that he is not, and was not, a career offender." *Id.* at 1189.

The Tenth Circuit was clearly in the minority when it held below that "[a] person cannot be actually innocent of a noncapital sentence." App. A4 (quoting *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993)). Two other circuits have said the actual innocence exception "only to the sentencing phase of death cases." *Embery v. Hershberger*, 131 F.3d 739, 740 (8th Cir. 1997); *Hope v. United States*, 108 F.3d 119 (7th Cir. 1997).

However, both of these arise in the context of post-AEDPA successive petitions. This is a material distinction because 28 U.S.C. § 2255(h)(1) limits a petitioner's ability to bring a successive petition to cases where he is actually innocent "of the offense." *See Hope*, 108 F.3d at 120 (acknowledging *Mills*, 979 F.2d 1273, but

concluding that petitioner could not challenge his sentence in a second petition filed after AEDPA). Thus, it is unclear to what extent these decisions abrogate prior holdings in the Seventh and Eighth Circuits that applied the actual innocence exception to noncapital sentences. *See Mills*, 979 F.2d at 1279 (7th Cir.1992); *Jones*, 929 F.2d at 381 (8th Cir. 1991). It may be that the Tenth Circuit is the only circuit to reject this rule across the board.

Setting § 2255(h)(1) aside, the better view is the one expressed in the cases discussed adopting the majority position because it comports better with this Court's decision in *Sawyer*. The Tenth Circuit below recognized there was a circuit split on this issue, yet it denied relief. *See also* App. A5 n.2. This Court should grant certiorari to resolve this split.

Here, Mr. Caldwell claims that he is factually innocent of the mandatory sentencing enhancement because he did not have two prior convictions that now qualify as crimes of violence under USSG §4B1.2. Significantly, the government never disagreed with the *substance* of this claim in the district court—that is, the government does not now argue that he was properly sentenced as a career offender. Instead, the government's only arguments were *procedural* reasons not to reach the merits of the claim. Because Mr. Caldwell is factually innocent of a mandatory habitual offender enhancement, it would be a miscarriage of justice to prevent him from getting relief from the unconstitutional application of that recidivist

enhancement. The circuit court should have excused the late filing under *McQuiggin* and reached the merits of his constitutional claim.

To be sure, some circuits have held that although the actual innocence exception applies to noncapital sentences, it does not include a claim that a claim that a petitioner's prior convictions were wrongly used to support the enhancement. *See, e.g., United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010). However, this rule is itself in conflict with at least one circuit. *See Allen v. Ives*, 950 F.3d at 1189 (9th Cir. 2020). Moreover, this line of cases goes to the contours of the exception and accepts that a petitioner *can* be actually innocent of a noncapital sentence. Thus, the existence of this line of cases does not eliminate the need for the Supreme Court to grant certiorari on whether the exception applies at all.

The Tenth Circuit is an outlier in its holding across the board that "[a] person cannot be actually innocent of a noncapital sentence." App. A4 (quoting *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993)). The only way to bring the Tenth Circuit into harmony with the rest of the circuits is to grant certiorari. Once the Court has granted certiorari, the parties can argue about what the actual innocence exception means in a challenge to a mandatory sentencing enhancement.

II. This question is important because it applies to many state and federal statutes.

Although this case arises in the context of a sentence imposed under mandatory sentencing guidelines, its significance is not limited to that context. For

example, federal law imposes a mandatory minimum 15-year penalty for Armed Career Criminals, 18 U.S.C. § 924(e), and it imposes mandatory life in prison for certain recidivist offenders. 18 U.S.C. § 3559(c)(1). The distinction between capital and noncapital sentences does not make sense for such offenders who will die in prison if they are procedurally barred from seeking relief from a mandatory sentence that they do not actually merit. States have similar mandatory recidivist laws that would be subject to this rule. *See, e.g.,* Ga. Code §17-10-7(b)(2) (imposing mandatory life without parole).

III. This case is a good vehicle to resolve the circuit split.

This case is a good vehicle to resolve the circuit split on this issue. The government did not dispute that Mr. Caldwell does not qualify as a career offender. The question presented was preserved and ruled on below, and it was dispositive of his claim. There are no procedural hurdles to this Court's direct review of the rules governing sentencing in this case. *See Horn v. United States*, 524 U.S. 236, 238-39 (1998) (holding that this Court has jurisdiction to review COA denials).

CONCLUSION

The Court should grant the writ to resolve the circuit splits on this important question.

Respectfully submitted,

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March 18, 2022

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AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Elizabeth Prelogar
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the UPS on March 18, 2022, and all parties required to be served have been served.

/S/ Benjamin C. McMurray
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Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

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