No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

KEITH ROSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____◆_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit

_____◆_____

# PETITION FOR WRIT OF CERTIORARI

_____◆_____

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## QUESTIONS PRESENTED

1. In *Class v. United States*, 138 S. Ct. 798 (2018), this Court held that a plea of guilty, without more, does not prevent an individual from having his claim adjudicated on the merits that he was convicted of an offense that does not constitute a crime. The question presented here is whether the right this Court recognized in *Class* extends to collateral review.

2. Alternatively, the question presented is, if an individual pleaded guilty pursuant to a plea agreement that prohibited his right to collaterally attack his conviction, does a court still have a duty to assess whether an individual is currently incarcerated for conduct that is not now, and never was, a crime, and thus whether it had the authority to impose a sentence in the first place, or, can the government, through the plea agreement it structures, forever bar individuals from accessing the court to have their claim adjudicated on the merits that they have been stripped of their liberty on the basis of engaging in conduct that, following clarification from this Court, does not constitute a crime.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## LIST OF RELATED PROCEEDINGS

*United States v. Keith Rose*, No. 17-16769 (9th Cir.)

*United States v. Keith Rose*, No. 07-cr-00156 (E.D. Cal.)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Rose respectfully petitions this Court for a writ of certiorari to review the decision by the United States Court of Appeals for the Ninth Circuit dismissing his 28 U.S.C. § 2255 motion without reaching the merits of his claim that following clarification of the law by this Court in *United States v. Davis*, 139 S. Ct. 2319 (2019), he is being incarcerated for engaging in conduct that is not now, and never was criminal, and thus the court lacked the authority to impose the sentence that he is currently serving.

## OPINIONS BELOW

On August 21, 2017, the district court denied Rose's 28 U.S.C. § 2255 motion to vacate and correct his sentence on the merits. The district court's decision is unpublished and reproduced in the appendix at D1-D2. On October 1, 2020, the United States Court of Appeals for the Ninth Circuit granted Rose's request for a certificate of appealability with respect to whether Rose's conviction and sentence for violating 18 U.S.C. § 924(c) must be vacated because conspiracy to commit Hobbs Act robbery is not a qualifying predicate crime of violence. The order is unpublished and reproduced in the appendix at C1-C2.

Without reaching the merits, on December 21, 2021, in reliance on a waiver provision in Rose's plea agreement, the United States Court of Appeals for the Ninth Circuit affirmed the district court's denial of Rose's 28 U.S.C. § 2255 motion to vacate and correct his sentence. The Ninth Circuit's decision was an unpublished memorandum that is reproduced in the appendix to this petition at B1-B4. Rose

filed a petition for rehearing en banc, which the Ninth Circuit denied on February 23, 2022 in the order reproduced in the appendix at A1.

The February 3, 2010 Judgment in a Criminal Case of the United States District Court for the Eastern District of California sentencing Rose to 300 months imprisonment is reproduced in the appendix at E1-E6.

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## JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Rose's request for rehearing en banc was filed on February 23, 2021. Appx. A1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

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## PROVISIONS OF LAW INVOLVED

**Article I, Section 9, Clause 2** of the United States Constitution provides in relevant part:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

The **Fifth Amendment** to the United States Constitution provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

The **Eight Amendment** to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## STATEMENT

Rose requests certiorari because urgent action is needed by this Court to ensure that the lower courts are not abdicating their responsibility to ensure that, following clarification of the law by this Court, individuals who pled guilty pursuant to a plea agreement structured by the government are not currently being incarcerated for conduct that is not now, and never was, a crime. This case arises following the clarification this Court provided in *United States v. Davis*, 139 S. Ct. 2319 (2019), striking down the residual clause of 18 U.S.C. § 924(c)(3) as unconstitutional vague, which means that individuals whose current incarceration is predicated on an offense that only qualified as a § 924(c) predicate under the residual clause are being held in custody for conduct that is not now, and never was, criminal. Rose brought a motion under 28 U.S.C. § 2255 claiming that the offense on which his § 924(c) conviction rests qualified as a predicate offense only under § 924(c)'s residual clause, and thus he is currently being deprived his liberty for conduct that does not constitute a crime.

The Ninth Circuit has taken the position that even if a successful claim would establish that the government is currently holding an individual in custody on the basis of conduct that does not, and never did, constitute a crime, because Rose pleaded guilty pursuant to a plea agreement, his misgivings about being incarcerated for non-criminal conduct is a simple case of "buyer's remorse," about which the court need not concern itself. *United States v. Goodall*, 21 F.4th 555, 562-64 (9th Cir. 2021). At best, the Ninth Circuit's laissez-faire attitude with respect to

the criminal justice system is premised on a naïve and highly romanticized conception of the "negotiation" process that results in a plea agreement, as the facts of this case make starkly apparent, and which threaten to undermine the public's perception of fairness and justice upon which the efficacy and vitality of our criminal justice system depends.

Alarmingly, the Ninth Circuit is not alone. In addition to the Ninth Circuit, at least in the Fifth, Sixth and Seventh Circuits, the courts will not intervene to provide relief to individuals who are currently incarcerated for conduct that is not now, and never was, a crime so long as the government structured a plea deal purportedly denying individuals access to the courts to adjudicate on the merits any claim that the court lacked the authority to impose the sentence it did because the conduct at issue never constituted a crime. In other words, at a tremendous cost to the long-term health of our criminal justice system, those four circuits are permitting the government to extract plea deals from individuals that are premised on conduct that, with the benefit of hindsight, did not constitute a crime, and then inoculating their conduct from review through appellate and collateral attack waivers that effectively mandate the continued incarceration of individuals who are innocent of their offense of conviction.

There is now a well-defined and entrenched splits amongst the circuits, with at least the First, Third, Fourth, Eighth and Tenth circuits permitting individuals access to the courts, notwithstanding waivers in a plea agreement, to have their claims adjudicated on the merits that, if successful, would establish that they are

currently serving a sentence a court had no authority to impose because the conduct underlying the conviction was not now, and never was, a crime. In other words, whether individuals in this country are currently being stripped of their liberty for conduct that never was criminal, is determined by the jurisdiction in which their cases arises. Urgent action is needed by this Court to address that most basic inequity, which has profound implications for the health of our criminal justice system.

### A. Plea Agreements Structured By the Government Have Effectively Become Our System of Criminal Justice.

In 1970, this Court observed a "prevalence" of pleas," noting that over 75% "of the criminal convictions in this country rest on pleas of guilty." *Brady v. United States*, 397 U.S. 742, 752-53 (1970). And, by 1978, this Court recognized that plea bargaining had become an "important component[] of this country's criminal justice system." *Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978). Over the next few decades plea bargaining would go from being an "important component" of our criminal justice system, to effectively becoming our criminal justice system. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (observing that "criminal justice today is for the most part a system of pleas, not a system of trials); *accord* Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212-13 (2005).

Notably, in the span of 32 years, the percentage of criminal cases resolved through plea agreements increased from over 75% to over 90%. *United States v. Ruiz*, 536 U.S. 662, 623 (2002) (noting the "heavy reliance upon plea bargaining" to

resolve criminal prosecutions. That percentage increased to 95% by 2010, *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010), and to 97% of all federal convictions by 2012. *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012). Indeed, as the *Frye* court recognized, the government's plea agreements "'determine[] who goes to jail and for how long'" with plea agreements representing "'not some adjunct to the criminal justice system" but rather "the criminal justice system.'" *Id*. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992)).

"Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them." *Brady* , 397 U.S. at 752-53. Where the "methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged," *Coppedge v. United States*, 369 U.S. 438, 449 (1962), this Court has a critical and evolving responsibility to ensure a modicum of fairness, justice and equality in a criminal justice system defined by plea agreements structured by the government. *See, e.g.*, *United States v. Garza*, 139 S. Ct. 738 (2019), *Missouri v. Frye*, 566 U.S. 134 (2012), *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Padilla v. Kentucky*, 559 U.S. 356 (2010). This case provides this Court with another such opportunity.

In the Ninth Circuit where this case originates, it is "the rare plea agreement . . . that lack[s] a waiver clause;" the waivers are part and parcel of any plea agreement—they are not optional. King & O'Neill, 55 Duke L.J. at 231. In other words, it is a criminal justice system defined not only by plea agreements, but by

plea waivers. In *United States v. Garza* this Court recognized that the lower courts have applied exceptions to appellate and collateral attack waivers for a variety of claims, but made no statement "on what particular exceptions may be required." 139 S. Ct. at 745 n.6. This case presents this Court with the much needed opportunity to codify a miscarriage of justice exception that at minimum provides access to the courts to have a claim adjudicated on the merits which, if successful, would establish that, following clarification of the law by this Court, the offense of conviction upon which the individual's current incarceration is based is not now, and never was, a crime.

The "completely laissez-faire approach to proven injustices" adopted by the Ninth Circuit, and at least three other circuits, threatens to undermine the very foundation of our criminal justice system. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1119, 1161 (2011). Plea agreements "are not simple bilateral deals; they should also respect victims' and the public's sense of justice." *Id.* After all, "however convenient these [shortcuts that these four circuits are currently taking by abdicating their responsibility to assess whether a plea agreement has worked such an egregious miscarriage of justice that an individual is currently incarcerated for non-criminal conduct] may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." *United States v. Haymond*,

139 S. Ct. 2369, 2384 (2019) (quoting 4 W. Blackstone, Commentaries on the Laws of England 298 (1769)). This Court has a responsibility to safeguard the public's perception of fairness, equality and justice upon which the efficacy and vitality of our criminal justice system depends, and this case presents an excellent opportunity for it to do so. Indeed, it is difficult to imagine a case in which the government's unchecked and overbearing power that has barred a young black man from accessing the courts to review his claim that he is currently being held in custody for conduct that is not, and never was, criminal, is more clearly and disturbingly on display.

### B. Few Cases Better Illustrate the Awesome Power of the Government to Structure the Terms of a Plea Agreement Than This One.

"Between December 24, 2005 and July 24, 2006, Marcus Major, Jordan Huff, and Victor Murray were involved in a conspiracy to commit, and committed, 30 armed robberies." Government's Answering Brief, *United States v. Rose*, No. 17-16769, Dkt. Entry 15, at 2 (9th Cir. April 7, 2021) ["Answering Brief"]. Rose did not join the conspiracy until the last two months when there were only six robberies left. *Id*. Pursuant to the factual basis in the plea agreement and the Presentence Report prepared by U.S. Probation, Rose did not join the conspiracy until May 10, 2006, which was *two days before* his 18th birthday. He was brought into the conspiracy through his stepbrother, Jordan Huff. Two of the six robberies occurring after Rose joined the conspiracy transpired when Rose was still 17 years old; the remaining four occurred during the course of the next two months. Rose had no

prior criminal history and was engaged to be married to the mother of his child who worked as a financial aid counselor for the local school district.

Notwithstanding his lack of criminal history and the fact that by the government's own admission, Rose did not enter the conspiracy until there were only six robberies left—and he was only 18 years old for the last ***four*** robberies—the government elected to file a 62-count indictment against Rose, charging him with ***thirty counts*** of Hobbs Act robbery and ***thirty counts of violating 18 U.S.C. § 924(c)***,[1] in addition to one count of conspiracy to commit Hobbs Act robbery and one count of conspiring to violate § 924(c). As the government argued below in touting the "benefit" of the plea agreement it offered Rose, based on how it elected to charge the case, "[i]f Rose had been convicted on all of the charges, he would have

[1] While there is no evidence to suggest that the government's decision to charge an 18-year old Black adolescent who had no prior criminal history with 30 counts of violating § 924(c) was consciously based on race, the statistics regarding who the government has historically pursued multiple § 924(c) counts against are concerning. Specifically, in 2010, the year Rose was sentenced, of the cases in which the government elected to deploy extreme negotiating leverage over defendants by charging multiple counts of violating § 924(c) in a single case, only 15% of the defendants were white, while 61% were black. U.S. Sentencing Commission, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 274 (20111), *available at* https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system. It seems unlikely that disparity is the result of mere happenstance. *See, e.g.*, James Forman Jr. and Kayla Vinson, *The Legacy of the Superpredator Myth*, N.Y. Times, Sun. Rev. Desk at 3 (April 24, 2022) (explaining that the now debunked superpredator myth popularized by political science professor, John J. DiIulio Jr., at the turn of this century, tapped into this "country's long history of racialized fear" and predicated "an unrivaled new crime threat"—"unusually violent teenagers" who would "disproportionately be Black boys").

received at least the mandatory prison sentence for the § 924(c) charges of **9,120 months (760 years**)." Answering Brief, at 8.[2]

Given that through its charging decisions the government was threatening Rose with 760 years if he went to trial,[3] Rose not surprisingly agreed to resolve the case through the plea agreement extended by the government, which included appellate and collateral attack waivers. Given the extreme imbalance of power, which was primarily a factor of how the government elected to charge the case, it is disingenuous to suggest Rose had any negotiating leverage when it came to crafting the terms of his plea agreement.

Pursuant to that agreement Rose was convicted on one count of conspiring to violate 18 U.S.C. § 1951 (Hobbs Act robbery) and one count of violating 18 U.S.C. § 924(c) premised on one of the robberies alleged as an overt act of the conspiracy, and was to be sentenced to 25 years. Consistent with the plea agreement the court sentenced Rose to 6.5 years on the conspiracy count and 18.5 years on the § 924(c)

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[2] Of course, following clarification by Congress in the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, and in light of the government's subsequent admission that it now contends Rose was only involved in four of the robberies (Answering Brief, at 8), Rose's exposure on the § 924(c) counts if convicted today would be at most 31 years, and if we count only the two robberies that occurred after he turned 18, Rose's exposure on the § 924(c) counts would be 14 years. Those calculations are premised on the fact that one of the § 924(c) charges occurring before Rose turned 18 years old was for discharging a firearm, which carries a mandatory sentence of 10 years, while the remaining four charges alleged brandishing a firearm, which carries a mandatory minimum of 7 years. 18 U.S.C. § 924(c)(1)(A)(ii) and (iii).

[3] Rose's co-defendants, Marcus Major and Jordan Huff, did elect to go to trial, and are currently serving sentences in excess of 742 years each.

count. The government dismissed *all* of the substantive counts of § 1951 it had alleged against Rose.

Having served approximately 15 years in custody, Rose has long since completed serving the sentence imposed for conspiring to commit Hobbs Act robbery. Following this Court's clarification in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and, subsequently, in *United States v. Davis*, 139 S. Ct. 2319 (2019), Rose brought a motion under 28 U.S.C. § 2255 contending that he had never been guilty of violating § 924(c), and thus his current incarceration is unlawful.

Endorsing, seemingly without limitation, that individual liberty is best governed by contracts of adhesion resulting from "plea negotiations" conducted against the backdrop of the charging decisions the government has elected to make, which here included at least 22 counts the government now seemingly acknowledges it could not have sustained, but which at the time it used to threaten to put away for life an 18-year old kid with no criminal history. Regardless of the fact that Rose had zero negotiating leverage—he could either take the plea agreement offered by the government or risk spending the rest of his life in custody—the Ninth Circuit contends that Rose's desire to have the Court adjudicate his claim that he is currently incarcerated for an offense that is not now, and never was, a crime, is simply a case of buyer's remorse that the court is powerless to address. Appx. B3-B4 (citing *United States v. Goodall*, 15 4th 987 (9th Cir. 2021).

While it is established law that the government can incentivize defendants to plead by hanging greater penalties over their head if they go to trial, surely the

Constitution places outer limits on that principle. Where "[p]rosecutors treat laws defining crimes and sentences as bargaining chips, while legislators liberally supply the chips[,]. . .they nullify most of the law of criminal procedure and change the character of the substantive law of crimes and sentences." William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 789, 803 (2006); *see, e.g.*, *Frye*, 566 U.S. at 144 (recognizing that "longer sentences exist on the books largely for bargaining purposes"). In such a scenario, "plea bargaining benefits both parties only in the sense that a gunman's demand for your money or your life benefits you as well as the gunman. Compared to death at the hands of the gunman, 'your money or your life' is a very attractive offer." Albert Alschuler, *A Nearly Perfect System for Convicting the Innocent*, Alb. L. Rev. 919, 925 n.31 (2015/2016).

As this Court has recognized, there "is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Surely the denial of access to the courts here crosses that constitutional line.

Historically, this Court has focused on "protect[ing] defendants against overbearing state power" in the context of criminal trials, while at the same time plea bargaining has "remained all but unregulated, a free market that sometimes resemble[s] a Turkish bazaar." Bibas, 99 Calif. L. Rev. at 1131. That has resulted

in the situation where the "same state against which defendants needed to be protected at trial could issue any number of lawful threats in bargaining [that] could. . .induce most defendants to surrender their Cadillac trials in exchange for scooter plea bargains." *Id*. Whatever one may think of those "scooter plea bargains," surely a provision unilaterally imposed by the government prohibiting an individual from accessing the courts to challenge his current incarceration on the basis that, following clarification from this Court, the conduct underlying his conviction is not now, and never was, a crime, runs afoul of the Fifth and Eight Amendments, and demands attention from a reviewing court.

The system that is currently in place in at least four circuits, including the Ninth Circuit, whereby the government is able to extract plea agreements from individuals for conduct that is not in fact criminal and at the same time categorically prohibit individuals from accessing the courts to adjudicate their claim that the government is currently depriving them of their liberty on the basis of non-criminal conduct, will inevitably erode the public's perception of fairness and equity upon which the vitality and efficacy of our criminal justice system depends. Urgent action is needed by this Court.

## REASONS FOR GRANTING THE WRIT

### A. The Plain Language of his Plea Agreement Does Not Bar a Collateral Attack on His Conviction, and thus the Right Recognized in *Class* Would Seem to Apply Here.

On the one hand, this case presents the Court with an opportunity to clarify that the right this Court recognized in *Class v. United States*, 138 S. Ct. 798 (2018), extends to the right to collaterally attack a conviction to the extent the conviction was not premised on a crime proscribed by Congress, and thus the sentencing court lacked the authority to strip the incarcerated individual of his liberty. 28 U.S.C. § 2255.

*Class* was a direct appeal from a conviction entered pursuant to a plea agreement in which Class waived some of his direct appeal rights, but not his right to challenge his conviction by raising a claim that when "'judged on its face based on the existing record would extinguish the government's power to constitutionally prosecute [him] if the claim were successful.'" *Class*, 138 S. Ct. at 806 (quoting *United States v. Broce*, 488 U.S. 563, 582 (1989)) (internal quotations omitted). The courts below had held that Class' guilty plea barred him from having his claim decided on the merits.

Similarly, *Rose* is a collateral attack from a conviction entered pursuant to a plea agreement in which Rose waived some of his collateral attack rights, but not his right to collaterally attack his conviction by raising a claim that when judged on its face based on the existing record would extinguish the government's power to

constitutionally prosecute him if the claim were successful.[4] The Ninth Circuit nevertheless held that Rose was barred from having his claim decided on the merits.

The only substantive difference between *Class* and *Rose*, is that Rose raised his challenge to the government's authority to imprison him in a collateral attack while Class did so on a direct appeal. Where Rose is no more barred than Class was by the terms of his plea agreement or the fact of his guilty plea than Class was, it would seem to follow by extension that Rose is entitled to have his claim

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[4] Rose's direct appeal waiver was broad, and prohibited attacks on his conviction, while his collateral attack waiver was narrower, and did not prohibit a challenge to his conviction; Class had the opposite waivers.

Specifically, Rose waived his direct appeal rights to challenge "his *conviction* and sentence, *including, but not limited to*, an express waiver of appeal of this plea." Plea Agreement, *United States v. Rose*, No. 1:07-cr-00156, Dkt. Entry 245, at 4 (E.D. Cal. Nov. 5, 2009). With respect to his collateral attack waiver—the waiver at issue here—Rose only agreed to waive his right "to attack collaterally his mental competence, and his plea, or his sentence." *Id*. Under the plain language of the agreement, Rose *did not waive his right to collaterally challenge his conviction*. *See, e.g*., Antonin Scalia & Bryan A. Garner, READING LAW: AN INTERPRETATION OF LEGAL TEXTS, at 170 n.5 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning."). A conviction is the "act or process of judicially finding someone guilty of a crime, whereas a plea is an "accused person's formal response of 'guilty,' 'not guilty,' or 'no contest' to a criminal charge." Conviction and Plea, BLACK'S LAW DICTIONARY (11th ed. 2019)(emphasis added). *See, e.g.*, *Deal v. United States*, 508 U.S. 129, 132 (1993) (explaining that "conviction" can either refer to "the finding of guilt by a judge or jury" or the "judgment of conviction" which "includes both the adjudication of guilt and the sentence," but either way a "conviction" refers to *the adjudication by the court that an individual has committed a crime*).

In contrast to Rose, Class agreed to a much broader collateral attack waiver in which he did agree to "waive any right to challenge *the conviction* entered or sentence imposed under this Agreement." Plea Agreement, *United States v. Class*, No.1:13-cr-00253, Dkt. Entry 169, at 6-7 (D.D.C. Nov. 21, 2014) (emphasis added).

adjudicated on the merits that he is currently incarcerated for conduct that does not constitute an offense. Indeed, such a claim sounds at the very heart of the right to habeas corpus.

"Habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). And by "jurisdiction" in this context this Court has established that "[i]f the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged." *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884). In other words, a court lacked the requisite jurisdiction to strip an individual of his liberty when "the statute under which the defendant had been prosecuted was unconstitutional," as this Court subsequently found the residual clause of § 924(c)(3) to be, "or because the sentence was one the court could not lawfully impose." *Montgomery v. Louisiana*, 577 U.S. 190, 203 (2016). *See, e.g.*, *Edwards v. Vannoy*, 141 S. Ct. 1547, 1567 (2021) (Gorsuch, J., concurring) (Explaining that historically, while "[c]ustody pursuant to a final judgement was *proof* that a defendant received the process due to him," there is "one important exception"—a "habeas court [can] grant relief if the court of conviction lacked jurisdiction over the defendant or his offense"); *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) (emphasizing that the core function of habeas corpus is to challenge "the legal competence or jurisdiction of the committing court").

Rose is making exactly the jurisdictional challenge that has always been at the core of the right to habeas corpus in this country—he is challenging the authority of the government to hold him in custody for conduct that is not now, and never was, an offense proscribed by Congress. Rose is not claiming that a new law weakened the government's case or altered the penalties he was exposed to—like Class—he is claiming that the court had no authority to strip him of his liberty because the conduct he admitted to did not constitute a crime, which only became clear after this Court's decisions in *Johnson* and *Davis*.

Likewise, Rose is not complaining of "antecedent constitutional violations" such that his "federal habeas corpus proceeding" "is limited" "to attacks on the voluntary and intelligent nature of the guilty plea." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974). To the contrary, like Blackledge, Rose is challenging "the very power of the State to bring the defendant into court to answer the charge brought against him" in the first place. *Id*. *See, e.g.*, *Class*, 138 S. Ct. at 805 (reiterating that while a guilty plea prevents a defendant from challenging "the constitutionality of case-related government conduct," it does not prevent a defendant from raising a claim that "would extinguish the government's power to constitutionally prosecute the defendant *if* the claim were successful") (internal quotations omitted) (emphasis added); *United States v. Broce*, 488 U.S. 563, 569 (1989) (confirming that a plea of guilty does not preclude a collateral challenge that "on the face of the record the court had no power to enter the conviction or impose the sentence").

Accordingly, the fact that Rose is raising his jurisdictional challenge in the context of habeas corpus rather than a direct appeal should not give rise to any obstacle that was not present in *Class*, and thus it would seem that both vehicles should be equally available for the claim at issue. As in *Class*, Rose's "constitutional claims. . . do not contradict the terms of the indictment or the written plea agreement. They are consistent with [his] knowing, voluntary, and intelligent admission that he did what the indictment alleged." *Class*, 138 S. Ct. at 804. Instead, "[t]hey challenge the Government's power to criminalize [his] (admitted) conduct. They thereby call into question the Government's power to constitutionally prosecute him." *Id*. at 805.

Specifically, Rose argues that where his only substantive count of conviction was for a conspiracy that included the Bulldog Liquor robbery as an overt act, and where the government affirmatively decided not to pursue any substantive count of Hobbs Act robbery against Rose, including the charge pertaining to the Bulldog Liquor robbery, even though in the plea agreement the government relied on a theory of principal liability in securing his § 924(c) conviction, by definition that principal liability was derivative of his conspiracy conviction pursuant to *Pinkerton v. United States*, 328 U.S. 640 (1946), and as such could only have been secured under the risk-based residual clause of § 924(c)(3)(B) that *United States v. Davis*, 139 S. Ct. 2319 (2019) struck down as unconstitutionally vague.[5]

[5] Notably, at the trial of Rose's co-defendants, Marcus Major and Jordan Huff, the government requested and received a jury instruction that permitted the jury to convict under the theory of *Pinkerton* liability.

The "residual clause. . . sweeps more broadly than the elements clause—potentially reaching offenses. . . that do not have violence as an element but that arguably create a substantial risk of violence." *Davis*, 139 S. Ct. at 2334 (internal quotations omitted); *Id*. at 2339 (Kavanaugh, J., dissenting) (describing § 924(c)(3)(B) as "the substantial-risk prong" that reaches convictions "that are not necessarily violent by definition under the elements prong"). By contrast, the elements clause, § 924(c)(3)(A), is premised on a defendant's election to actively deploy force targeted at another in full appreciation of the harm his conduct will cause. *Borden v. United States*, 141 S.Ct. 1817, 1823 (2021) (to qualify as a predicate offense under the elements clause, a conviction must necessarily establish the defendant made "a deliberate choice [to use force] with full awareness of [the] consequent harm") (plurality); *Id*. at 1835 (Thomas, J., concurring in the judgment) (agreeing with the plurality that the elements clause only captures intentional conduct "designed to cause harm" to another). That awareness is not an element of *Pinkerton* liability. Accordingly, Rose argues that the government's decision to dismiss all substantive counts of Hobbs Act robbery against him, should be dispositive; his conviction for violating § 924(c) could only have been secured under the residual clause.

Where Class was not barred from having his claim adjudicated on the merits that he was being held in custody for conduct that never constituted a crime, there seems to be no conceivable basis to treat Rose differently simply because his claim arises in the form of a collateral attack. Regardless of the procedural posture, a

plea of guilty should not bar a claim that a court lacked the authority to convict and sentence a defendant, no matter how valid his factual guilt, where the facts he pled guilty to are subsequently determined not to constitute criminal conduct. *Class*, 138 S. Ct. at 804 (Where "'the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged.'") (quoting *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869)).

Clarity is needed from this Court that the right this Court recognized in *Class*, applies equally to a similarly situated defendant bringing the same challenge to a court's jurisdiction to imprison him in a motion to vacate his sentence pursuant to 28 U.S.C. § 2255.

**B. To the Extent that the Plea Agreement Purports to Deny Rose Access to the Courts, this Court Should Resolve a Circuit Split and Codify a Miscarriage of Justice Exception that Confirms the Terms of a Plea Agreement Can Never Absolve a Court of its Duty to Inquire Whether an Individual is Currently Being Incarcerated for Conduct that Does Not Constitute a Crime**.

Alternatively, it should not matter whether Rose explicitly retained his right to raise the claim that he is currently being incarcerated for conduct that does not, and never did, constitute a crime. Presumably, that is a claim that can never be waived. It is

> well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but *it is its duty* to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement.

*Ex parte Yarbrough*, 110 U.S. at 653 (emphasis added). *See, e.g.*, *Menna v. New York*, 423 U.S. 61, 62 (1975) ("Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, *federal law requires* that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.") (emphasis added). Indeed, it would seem to follow from this Court's decision in *Davis v. United States*, 417 U.S. 333 (1974) that an individual cannot waive the claim that he is currently being incarcerated for conduct that does not now, and never did, constitute a crime proscribed by Congress.

In *Davis* the defendant had been declared a "delinquent" by the State, and on the basis of that classification, he was ordered to report for induction. When he failed to do so he was prosecuted and convicted for that failure. *Id*. at 335-37. Subsequently, this Court held that a different Selective Service regulation that accelerated the induction of individuals classified as "delinquent" was punitive without legislative sanction, and thus a failure to comply with the induction order could not be prosecuted. *Id*. at 337-38. Subsequently, the Ninth Circuit ruled that this Court's decision applied equally to the Selective Service regulation at issue in *Davis*, but refused to provide Davis relief because the clarification establishing that Davis' conduct could not form the basis of a criminal prosecution came after Davis' conviction was final. *Id*. at 341-42. This Court reversed the Ninth Circuit's refusal to adjudicate on the merits his claim that because of a subsequent clarification in the law, the conduct for which he was being held in prison did not in fact constitute

a crime. *Id*. at 346-47 ("*If* [Davis'] contention is well taken, then Davis' conviction and punishment are for an act 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* and presents exceptional circumstances that justify collateral relief under § 2255") (internal quotations omitted) (emphasis added). This Court remanded to the Ninth Circuit for consideration on the merits.

The efficacy of our criminal justice system depends upon the perception of fairness and justice. As such, there presumably can be no tolerance for the proposition—upon which the Ninth Circuit's decision here rests—that the government can insist upon a contract by which an individual pleads guilty to conduct that is not in fact criminal, and at the same time deny an individual access to the courts to complain that the government has stripped him of his liberty without authority. It is difficult to imagine a greater miscarriage of justice, and the damage it does to our criminal justice system if the Ninth Circuit's decision is allowed to stand. The Ninth Circuit, along with three other circuits, have dangerously lost perspective on their role in overseeing the contracts that have come to define our criminal justice system, elevating what are effectively contracts of adhesion over its duty to inquire whether an individual is being deprived of his liberty on the basis of conduct that is not, and never was, criminal.

A plea agreement is not a commercial exchange. What is at stake is individual liberty and just punishment for those who engage in conduct prohibited by laws enacted by a democratically elected Congress. A slavish adherence to

contract law will inevitably produce grave injustices that will ultimately undermine the very system of criminal justice the reliance on plea agreements was meant to facilitate.[6]

"[H]abes corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319-20 (1995) (noting that a court "must adjudicate even a successive habeas claim when required to do so by the ends of justice" even though the language of § 2255 contains no reference to "ends of justice"). The principles of habeas corpus "must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). That means that procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration." *Schlup*, 513 U.S. 320-21. *Cf. McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (A "fundamental miscarriage of

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[6] Of course, the fundamental principles of contract law do not support enforcement of a contract where the principal purpose of the contract is substantially frustrated without fault of the parties "by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement 2d of Contracts § 265. Certainly, the parties' agreement here was premised on the understanding that simply by participating in a conspiracy Rose could be liable for violating 18 U.S.C. § 924(c). Likewise, courts will not enforce a contract that runs afoul of public policy, Restatement 2d of Contracts § 178, which presumably a contract that results in a complete miscarriage of justice does. Moreover, a contract that purports to rest on a false recital of consideration, such is the case where the government agrees to dismiss 29 counts that it had no authority to bring against the defendant in the first place, is no contract at all. Restatement 2d of Contracts § 71. In other words, even elevating contract law to the exclusion of all other considerations, as the Ninth Circuit purports to do, if the terms of the contract were as the Ninth Circuit believes them to be, the "contract" would be unenforceable on multiple grounds.

justice" occurs "when a constitutional violation *probably has caused* the conviction of one innocent of the crime," recognizing that the "the ends of justice will [not] be served in full" where the government "compel[s] an innocent man to suffer an unconstitutional loss of liberty.") (emphasis added).

Indeed, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system" *Schlup*, 513 U.S. at 325. The overriding interest in preventing a "miscarriage of justice" "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 v. Perkins*, 569 U.S. 383, 392-93 (2013) (internal quotations omitted) (holding that the "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate [even] when the impediment is AEDPA's statute of limitations). If concern for incarcerating someone who is innocent of the charge of conviction surmounts statute of limitations imposed by Congress, surely it overrides a contract drafted by the government in an individual case.

Because "personal liberty is of so great moment in the eye of law," notwithstanding the conclusive nature of a final judgment, said conviction is subject to review on habeas "because if the laws [upon which an individual's incarceration rests] are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879). In other words, an offense created by an unconstitutional law "is not a crime," and thus a "conviction

under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id.* (emphasis added).

As this Court has recently reiterated, some "laws and punishments [are] altogether beyond the State's power to impose," and "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016). Accordingly, not only can parties not contract for an illegal result, Restatement 2d of Contracts § 178, a court lacks the authority—jurisdiction—to accept and enforce a parties' agreement to strip an individual of his liberty for conduct that does not constitute a crime.

If Rose's claim is correct, "even the use of impeccable factfinding procedures could not legitimate" his conviction because "the conduct being penalized is constitutionally immune from punishment," and thus his continued incarceration is unlawful, and no court had the authority to impose it in the first place. *Montgomery*, 577 U.S. at 201. Accordingly, if the government "had no power to proscribe the conduct for which [Rose is] imprisoned, it [can]not constitutionally insist that he remain in jail." *Id.* at 202-03 (citing *Ex parte Siebold*, 100 U.S. at 376-77). And, "a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id.* at 203.

The fact that the government secured Rose's incarceration through a contract should not alter the results. A contract cannot make something un-void that is

void. And, a " penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Montgomery v. Louisiana*, 577 U.S. at 204.

Surprisingly, however, there is a deep circuit split over whether courts have a duty through a miscarriage of justice exception to override waivers in a plea agreement to inquire whether an individual is being incarcerated for conduct that is not criminal and for which the court had no authority to impose punishment in the first place.

The First, Third, Fourth, Eighth and Tenth Circuits all have recognized a miscarriage of justice exception through which they fulfill their duty to inquire whether an individual has been stripped of his liberty for conduct that is not criminal, notwithstanding a waiver in a plea agreement otherwise denying a defendant access to the courts.[7]

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[7] The Eleventh Circuit has held that the issue of whether a court had the authority to convict and sentence someone following clarification of the law by this Court, presents a jurisdictional issues, which presumably cannot be waived by a contract, but about which the Eleventh Circuit has not been called on to opine because the waivers secured by the government have extended only to sentences imposed, not convictions sustained. *United States v. St. Hubert*, 909 F.3d 335, 344 (11th Cir. 2018). *See, e.g.*, *Brown v. United States*, 942 F.3d 1069, 1073-74 (11th Cir. 2019) (observing that the fact that the government dismissed counts, that would have served as a predicate to § 924(c) if it could have established commission of the offense beyond a reasonable doubt, is of no relevance; the "government was free to seek a conviction. . . on any charge it desired," and it did that, and now it is the Court's responsibility to determine whether the offense of conviction that is the basis of an individual's current incarceration is in fact a crime).

The First Circuit has recognized that while plea agreements with "[a]ppellate waivers are meant to bring finality to proceedings conducted in the ordinary course,. . .they are not intended to leave defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable)." *United States v. Cabrera-Rivera*, 893 F.3d 14, 23 (1st Cir. 2018) (internal quotations omitted). Accordingly, if an appellate waiver "would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver." *Id*. at 23-24 (internal quotations omitted). A miscarriage of justice sufficient to override an appellate waiver "must be, at a bare minimum, an increment of error more glaring than routine reversible error." *Id*. at 24 (internal quotations omitted). Whether a claim, if successful, rises to the level of a miscarriage of justice requires consideration of "among other things, the clarity of the alleged error, its character and gravity, its impact on the defendant, any possible prejudice to the government, and the extent to which the defendant acquiesced in the result." *Id*. (internal quotations omitted). The need for an appellate court to retain the authority to override an appellate waiver is informed not only by a concern for "fairness to the defendant," but also the institutional need to preserve "public confidence in the judicial system." *United States v. Teeter*, 257 F.3d 14, 23-24 (1st Cir. 2001). Notably, the First Circuit recently invoked the miscarriage of justice exception to permit individuals who had knowingly and voluntarily waived their right to appeal their judgment and sentences, to adjudicate on the merits their challenge to the constitutionality of the

statute of conviction. *United States v. Davila-Reyes*, 23 F.4th 153, 162 (1st Cir. 2022).

The Third Circuit likewise recognizes a miscarriage of justice exception to waivers in plea agreements that would otherwise bar review. In the Third Circuit, the miscarriage of justice exception applies "only where the record is devoid of evidence pointing to guilt," such as when there "has been a complete failure of proof on an essential element." *United States v. Castro*, 704 F.3d 125, 138-39 (3d Cir. 2013). The justification for the exception is premised on the need to safeguard "the fairness, integrity [and] public reputation of judicial proceedings." *Id*. at 138 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). As the Third Circuit observed, stripping individuals of their liberty must be premised on actual criminal conduct, not simply on "being bad." *Id*. at 140. Like the First Circuit, the Third Circuit has articulated some factors to help guide the court's decision to override an appellate waiver, but ultimately "the governing standard. . . is whether the error would work a miscarriage of justice." *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001).

The Fourth Circuit also recognizes a miscarriage of justice exception to waivers in plea agreements that would otherwise bar access to the courts. In so doing, the Fourth Circuit is partly informed by the principles of contract law, recognizing that where an unknown constitutional right means the defendant could not have been prosecuted at all, the plea agreement upon which his conviction is based represents an empty bargain devoid of consideration, and as such is the equivalent of no bargain at all. *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir.

1975). The Fourth Circuit also grounds the miscarriage of justice exception squarely in the Constitution, observing that "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'" *United States v. Adams*, 814 F.3d 178, 185 (4th Cir. 2016) (quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). *See, e.g*, *United States v. Cornette*, 932 F.3d 204, 209-10 (4th Cir. 2019) (overriding the defendant's appellate waiver where in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) the district court had lacked the authority to impose a sentence under the residual clause of the Armed Career Criminal Act). Notably, in an unpublished decision, the Fourth Circuit has reached the merits of a claim substantively identical to the one raised by Rose, reasoning that in light of *Davis*, a claim that a conviction under § 924(c) was premised on the residual clause is a claim that would constitute a miscarriage of justice if successful. *United States v. Sweeney*, 833 F. App'x 395, 396-97 (4th Cir. 2021).

While the Eighth Circuit recognizes a miscarriage of justice exception when a sentence was "not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime" *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (en banc) (internal quotations omitted), the scope of that exception is not clear. Indeed, four of the judges in *Andis* based their concurrence on the proposition that a defendant who knowingly waives his appellate rights shall "have no recourse in the event of an error on the part of a

district court," *id*. at 896 (Arnold, J. concurring in part), to which Judge Bye responded:

> As a practical matter. . .I doubt criminal defendants have the prescience and bargaining power necessary to participate as full and equal players in the contractual process Judge Arnold envisions. Applying pure contract theory in the plea bargain context insufficiently accounts for the imbalance of power between prosecutors and defendants. Nor does contract theory acceptably govern the disparate consequences to the parties should they misjudge the risks.

*Id*. at 896 (Bye, J., concurring). Notably, in an unpublished decision, the Eighth Circuit did reach the merits of a *Davis* claim despite the defendant having plead guilty pursuant to an 11(c)(1)(C) agreement with an appellate waiver. *United States v. Gathercole*, 795 F. App'x 985, 986 (8th Cir. 2020) (unpub) (enforcing the appellate waiver against all other claims).

The Tenth Circuit has adopted "with slight variation" the Eight Circuit's analysis in *Andis*. *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004). Specifically, the Tenth Circuit recognizes a miscarriage of justice exception that permits courts to adjudicate a claim on the merits if the claim contends that the waiver is "unlawful" and, if successful, the complained about error would "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 1327 (quoting *Olano*, 507 U.S. at 732).

The Fifth, Sixth, Seventh and Ninth Circuits have gone in the opposite direction. While most, if not all, of the aforementioned circuits have refused to explicitly adopt or reject a miscarriage of justice exception, their jurisprudence elevating the primacy of contract law over a court's duty to inquire whether an

individual is currently incarcerated for conduct that does not, and never did, constitute a crime, leaves no room for such an exception.

In the Fifth Circuit, if an individual waives his collateral attack rights and a later decision by this Court clarifies that the sentencing court lacked the authority to impose the sentence it did, the fact that the individual is complaining about serving a sentence five years in excess of the statutory maximum for the offense of conviction, is simply a case of buyer's remorse that does not merit further inquiry from the court. *United States v. Barnes*, 953 F.3d 383 (5th Cir. 2020). Barnes pled guilty to violating 18 U.S.C. § 922(g) pursuant to a plea agreement with a collateral attack waiver. His offense of conviction carried a 10-year statutory maximum unless he had three predicate offenses that triggered the Armed Career Criminal provision, which mandates a 15-year minimum sentence. At the time of sentencing the court found Barnes had the requisite three predicate offenses and sentenced him under the ACCA. After *Johnson*, Barnes brought a § 2255 motion claiming that the sentencing court had lacked the authority to impose a sentence above the 10-year statutory maximum because he did not have three predicate offenses. *Id*. at 385. The Fifth Circuit held that because Barnes' claim did not allege ineffective assistance of counsel or that the sentencing court had sentenced him in excess of the statutory maximum *as it was understood at the time*, it was of no moment that with the benefit of hindsight it was possible the sentencing court lacked the authority to impose the sentence that it did. *Id*. at 388-89. The Fifth Circuit reasoned that "[w]hen Barnes waived his right to post-conviction review, he was aware of the right

that he was giving up. By doing so, he assumed the risk that he would be denied the benefit of a future legal development," even if that future development meant the sentencing court had lacked the authority to impose the sentence that it did. *Id.* (internal quotations omitted).

Just like the Fifth Circuit, the Sixth Circuit permits a defendant with a broad waiver to claim that a court sentenced an individual in excess of the statutory maximum *as that maximum was understood at the time of sentencing*, but prohibits an individual from claiming that, with the benefit of hindsight due to subsequent clarification of the law by this Court, the court lacked the authority to convict and/or sentence him in the first place. *Compare United States v. Caruthers*, 458 F.3d 459, 471-72 (6th Cir. 2006) (entertaining a challenge to the ACCA predicates under existing law) and *Portis v. United States*, __F.4th__, Nos. 20-3776/3780, 2022 U.S. App. LEXIS 11936 (6th Cir. 2022) (prohibiting an individual with a collateral attack waiver from bring a § 2255 motion claiming that in light of *Davis* his conviction for conspiring to violate Hobbs Act robbery did not qualify as a predicate offense under § 924(c), and thus the court had been without authority to convict him of violating § 924(c) such that he was now serving a sentence the court had lacked jurisdiction to impose).

Seemingly oblivious to the definition of "fair," the Sixth Circuit reasoned that the "only fair reading of a 'statutory maximum' carve-out that comes with a collateral-attack waiver is that it applies only to sentences that exceed the statutory maximum at the time of the sentence." *Id.* at *9-10. Of course, following this

Court's clarification of the law in *Davis*, *Portis*' claim was that *at the time of the sentence*, the sentencing court did in fact lack the authority to impose the sentence it did. The Sixth Circuit's position, however, is that if it only comes to recognize a court lacked the authority to impose the sentence it did with the benefit of hindsight, it is of no moment that an individual continues to sit in jail serving a sentence that the court lacked the authority to impose; that is simply the individual's bad luck and a risk he assumed when he acquiesced to the terms of the government's plea agreement. *Id.* at *6. According to the Sixth Circuit, our criminal justice permits the incarceration of individuals who are innocent of their offense of conviction so long as we don't learn that a court lacked the authority to impose the sentence it did until after the conviction becomes final. Judge White dissented in *Portis*, arguing that "we should not be enforcing plea-agreement waivers when doing so could result in a miscarriage of justice—keeping individuals imprisoned on void convictions." *Id.* at *22 (White, J., dissenting).

Notwithstanding previously recognizing that "the Constitution places. . . limits that have no direct counterparts in the sphere of private contracting" such that a waiver of the right to appeal is limited "by judicial interpretations of the due process clause," the Seventh Circuit, like the Sixth Circuit, prohibits claims contending that with the benefit of hindsight, through clarification by this Court, the sentencing court lacked the authority to impose the sentence that it did either because it is in the excess of the statutory maximum (*United States v. Carson*, 855 F.3d 828 (7th Cir. 2017) or because the defendant is innocent of the offense of

conviction (*Oliver v. United States*, 951 F.3d 841 (7th Cir. 2020). In *Carson* the Seventh Circuit reasoned that because it was not possible to determine if a miscarriage of justice occurred "without resolving the merits of [the defendant's] appeal," the defendant's appellate waiver prohibited the court from determining if the sentencing court in fact lacked the authority to impose the sentence the defendant was currently serving. *Carson*, 855 F.3d at 831. Similarly, in *Oliver*, the Seventh Circuit reasoned that because this Court has not declared "non-waivable" claims by individuals contending that they are being held in custody for engaging in conduct that with the benefit of hindsight we now know was never a crime, it lacks the authority to "exercise [its] equitable powers" to provide relief; the individual is stuck serving a sentence for something that does not constitute a crime because he unwittingly agreed to do so. *Oliver*, 951 F.3d at 845-47. Indeed, the Seventh Circuit has recently gone even further, contending that even without a waiver, an individual who pleads guilty cannot later claim that with the benefit of clarification from this Court, he is being incarcerated for engaging in conduct that does not constitute a crime, so long as the clarification by this Court did not strike down the entire statute but only the clause under which the individual's conviction was premised. *Grzegorczyk v. United States*, 997 F.3d 743, 747-48 (7th Cir. 2021) (petition for certiorari pending in *Grzegorczyk v. United States*, Case No. 21-5967).

The Ninth Circuit, from which Rose's petition arises, follows the Seventh Circuit in *Oliver* and the Fifth Circuit in *Barnes*, to conclude that an individual complaining that he is currently in custody for conduct that is not, and never was a

crime, is simple a run of the mill case of "buyer's remorse" that does not merit the Court's attention. *United States v. Goodall*, 21 F.4th 555, 562-64 (9th Cir. 2021). Specifically, like Rose, Goodall argued that following the clarification provided by *Davis*, the conspiracy offense upon which his § 924(c) conviction rested is not, and never was, a predicate offense, and thus he was currently incarcerated for conduct that did not constitute a crime. *Id*. at 557-58. Even though the government conceded Goodall's conspiracy conviction did not constitute a predicate offense under § 924(c), the Ninth Circuit held that the defendant was stuck with the plea agreement he had previously accepted when the parties mistakenly believed conspiracy could serve as a predicate offense; "[t]here is no do-over just because a defendant later regrets agreeing to a plea deal." *Id*. at 562. According to the Ninth Circuit, the "benefits of plea bargaining—efficiency and finality—"outweigh the importance of ensuring individuals are not being held in custody for conduct that does not constitute a crime. *Id*. at 564. The Ninth Circuit denied Rose's § 2255 motion on the basis of *Goodall*. App. B3-B4. The Ninth Circuit is now repeatedly holding that its responsibility to assess whether someone is being incarcerated for conduct that does not constitute a crime is absolved by a government's plea agreement prohibiting an individual from ever complaining that he has been stripped of his liberty for engaging in conduct that does not constitute a crime. *See, e.g.*, *United States v. Alvarez*, No. 19-10421, 2022 U.S. App. LEXIS 10410 (9th Cir. 2022); *United States v. Juarez*, No. 18-16145, 2022 U.S. App. LEXIS 7915 (9th Cir. 2022); *United States v. Goldstein*, No. 17-16187, 2022 U.S. App. LEXIS 7929 (9th

Cir. 2022); *United States v. Figueroa*, No. 18-16151, 2022 U.S. App. LEXIS 7931 (9th Cir. 2022); *United States v. Espinoza-Gonzalez*, No. 17-15778, 2022 U.S. App. LEXIS 7507 (9th Cir. 2022); *United States v. Beckett*, No. 17-36005, 2022 U.S. App. LEXIS 109 (9th Cir. 2022).

At this point, therefore, the circuit split is deeply entrenched, and where both individual liberty and the long-term efficacy of our criminal justice system is at stake, it is impossible to over-estimate the consequences of inaction. Where at least four circuits have elevated contracts (while at the same time abandoning some basic principles of contract law) over their duty to inquire whether individuals are currently being held in custody for conduct that is not, and never was, a crime, urgent action is needed by this Court.

### C. This Case Provides An Excellent Vehicle for this Court to Confirm an Individual's Right to Access the Courts to Determine Whether, Following Clarification of the Law by This Court, the Conduct Underlying his Conviction Ever Constituted a Crime.

The issue presented here goes to the core of the fairness, credibility and integrity of our criminal justice system, and this case presents an ideal vehicle for providing much needed clarity regarding the scope of the courts' fundamental duty to inquire whether an individual is currently being incarcerated for conduct that does not constitute a crime, and thus is serving a sentence the court lacked the authority to impose from the outset.

First, the circuit split is ripe. The issue has percolated in nearly every circuit, resulting in a "messy field" that calls for this Court's review. *Prost v. Anderson*, 636 F.3d 578, 594 (10th Cir. 2011) (Gorsuch, J.). Second, if Rose's claim

is successful, he is currently being incarcerated for a nonexistent crime and should be immediately released. Third, there are no issues of fact, only pure questions of law. Fourth, Rose's case does not pose any danger of mootness; his current release date is November 11, 2028. Fifth, the facts of this case starkly illustrate the extreme imbalance of power that can exist between the parties conducting "plea negotiations," making it crystal clear that in a criminal justice system defined by plea agreements, courts have a vital role to play in continuing to protect the individual's most basic constitutional rights against overbearing state power. Sixth, this case tees up the issue of what should constitute a miscarriage of justice exception as narrowly as possible, given that, at minimum, if such an exception exists, it would include a court's duty to inquire whether an individual has been stripped of his liberty on the basis of criminal conduct, and thus whether a court had the authority to impose a sentence of incarceration.

Where the government has continued to attempt to control the process by selectively disavowing contract waivers where it believes the underlying claim has merit, it is unclear when the Court will have another opportunity to resolve this question that goes to the heart of our criminal justice system. This Court should grant Rose's petition to provide much needed clarity on the duty of the courts to inquire into their own authority to convict and impose sentences.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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