No. 22-_____

IN THE
Supreme Court of the United States

DEANDRE MARKEE KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The vast majority of federal criminal cases end in a guilty plea. And in many of those pleas, the defendant promises not to file a future 28 U.S.C. § 2255 motion to vacate his sentence. But what if the law later changes through a new substantive rule of constitutional law, like the rule in *United States v. Davis*, 139 S. Ct. 2319 (2019)? In this setting, a defendant stands convicted and sentenced for an act that is no longer a crime. He is actually innocent.

When a petitioner demonstrates through a retroactive constitutional rule that he is actually innocent, must an otherwise valid collateral-attack waiver foreclose habeas relief in spite of that innocence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Additional Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner DEANDRE MARKEE KING, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The published opinion of the Eleventh Circuit affirming the district court's denial of the 28 U.S.C. § 2255 motion, *King v. United States*, 41 F.4th 1363 (11th Cir. 2022), is included in the appendix below. Pet. App. 1. So, too, is the court's one-page order denying a petition for rehearing en banc. Pet App. 9. The district court's order denying Mr. King's § 2255 motion is also included. Pet. App. 10.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals. The Eleventh Circuit affirmed the district court's order denying Mr. King' § 2255 motion on July 28, 2022. The court then denied a petition for rehearing en banc on November 15, 2022. Justice Thomas granted an application to extend the deadline until March 15, 2023. S*ee* 28 U.S.C. § 2101 and Supreme Court Rules 13.5 and 30.2. Therefore, we have filed this petition on time.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) states in part:

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

> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3)(A), (B) provides:

For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

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

18 U.S.C. § 371, titled "Conspiracy to commit offense or to defraud United States," provides in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

INTRODUCTION

Half a century ago, Judge Henry J. Friendly asked the same question we ask here: "Is innocence irrelevant?" Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). And like Judge Friendly, we believe the answer ought to be "No." Strong headwinds—finality, preservation of judicial resources, and deterrence—face any criminal defendant hoping to convince a court to vacate his conviction. *Id.* at 146-148 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963)). But our position here will be consistent with long-standing habeas principles. Judge Friendly himself declared that "I would . . . allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man." *Id.* at 160.

The country traditionally protects persons from imprisonment when they have broken no law. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.") This qualitative value extends to the arena of habeas corpus. Indeed, this Court has long held that innocence *is* relevant. Innocence may be a gateway through which a habeas petitioner bypasses a variety of procedural hurdles, and finds relief on the merits of his post-conviction claim.

The Court first crafted an actual-innocence exception to excuse procedural default. *Schlup*, 513 U.S. at 314-315, 327-328 (forgiving procedural default upon a showing that

"it is more likely than not that no reasonable juror would have convicted" the defendant of the offense to which he pleaded guilty); *Bousley v. United States*, 523 U.S. 614, 622 (1998); *House v. Bell*, 547 U.S. 518, 555 (2006). Next, the Court endorsed the actual-innocence exception to excuse an untimely petition filed beyond the AEDPA's statute of limitations. *Perkins*, 569 U.S. at 392.

We ask the Court to extend these principles to a third procedural hurdle: the collateral-attack waiver. Several circuit courts have already done so, but others, including the Eleventh Circuit, have refused.

The Court should grant the petition for a writ of certiorari for several reasons:

First, the question here is the source of a deep conflict in the circuit courts. Four circuits—the Sixth, Seventh, Ninth, and now Eleventh Circuits—have enforced collateral-attack waivers against otherwise-winning innocence claims, like *Davis*. On the other side of the divide, three circuits—the Third, Fourth, and Eighth Circuits—have done exactly what we propose here. Just last month, the Fourth Circuit, for example, held that a generic collateral-attack waiver must give way to a winning *Davis* claim because that claim means the defendant is actually innocent. In light of this entrenched split, and without this Court's intervention, an innocent petitioner's freedom from imprisonment depends most of all upon the fluke of geography.

Second, this question is one of national importance that arises frequently in the lower courts. Defendants all over the country have pursued § 2255 relief in the wake of

Davis. The stakes for each is high: the § 924(c) crime leads to a substantial increase in a defendant's term of imprisonment (a consecutive term of five, seven, or ten years in prison for a first such violation). In more than a dozen cases in the last 30 years, this Court has chosen to resolve questions related to various corners of the § 924(c) statute. It is important that a statute, especially this hyper-punitive statute, apply uniformly throughout the country. Only this Court has the authority to impose that uniformity.

Third, this case is a strong vehicle for the Court to answer the question presented. The facts are undisputed, there are no other jurisdictional hurdles for the Court to navigate, and the Eleventh Circuit resolved Mr. King's appeal based exclusively upon the collateral-attack waiver.

Finally, the Eleventh Circuit, in the decision below, is wrong not to apply an actual-innocence exception to the waiver. This Court has not yet determined whether actual innocence may serve as an exception to a generic waiver. But if the actual-innocence gateway is an appropriate exemption to both procedural default (a jurisprudential doctrine crafted by this Court) and the statute of limitations (a jurisdictional bar penned by Congress in the AEDPA), it must also be appropriate not to enforce a collateral-attack waiver adopted by the parties in a plea agreement. The Eleventh Circuit has mistakenly turned a blind eye to this logical outcome.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

On March 13, 2013, Mr. King pled guilty to two federal crimes: conspiracy to commit bank robbery in violation of 18 U.S.C. § 371 and use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The crime of violence defined in the § 924(c) count was the conspiracy to commit bank robbery. Mr. King signed a plea agreement, in which he waived the right to file a future collateral attack against his conviction and sentence. In return, the government agreed to dismiss counts in the original indictment charging a Hobbs Act conspiracy, an armed bank robbery, and a § 924(c) count based upon that bank robbery.

The district court sentenced Mr. King to serve a total term of 135 months in prison, which included 51 months on the conspiracy count and a consecutive term of 84 months on the § 924(c) count. Mr. King did not appeal the conviction or sentence.

This Court later struck down the residual clause in § 924(c)(3)(B). *United States v. Davis*, 139 S. Ct. 2319 (2019). Mr. King promptly filed a 28 U.S.C. § 2255 motion on that ground. He argued that following *Davis*, his § 924(c) conviction—based solely upon the § 371 conspiracy—was unlawful. Indeed, the government conceded that "a § 924(c) conviction based on a conspiracy predicate is no longer viable after *Davis*."

Yet the district court, at the government's invitation, rejected the otherwise-winning *Davis* claim and denied the § 2255 motion for two reasons: procedural default and the

collateral-attack waiver. The district court granted Mr. King a certificate of appealability on both questions.

In a published opinion, the Eleventh Circuit resolved the case solely on the collateral-attack topic. *King*, 41 F.4th at 1365. The panel began this way: "A plea agreement is, in essence, a contract between the Government and a criminal defendant" and "[i]f courts step back from the contract-based approach for appeal waivers, it will upset significant reliance interests." *Id.* at 1367. "So even when a new constitutional rule might provide a strong basis for collateral attack, we enforce an appeal waiver according to its terms." *Id.* The panel held the collateral-attack waiver sacrosanct: "[A] defendant that waives the right to collaterally attack his sentence is bound by that decision. King's *Davis* claim is no exception." *Id.* at 1370.

The panel purposefully set the actual-innocence question to the side: "[W]e note that our Circuit has never adopted a general 'miscarriage of justice' exception to the rule that valid appeal waivers must be enforced according to their terms." *Id.* at 1368 n.3. Yet in a concurring opinion, one judge hinted that he might be willing to formally recognize the existence of an actual-innocence gateway through an appeal waiver. *Id.* at 1372 (Anderson, S.J., concurring). However, Judge Anderson, like the panel itself, chose not to decide the question because he believed (mistakenly) that Mr. King failed to demonstrate his actual innocence.

We say "mistakenly" because Mr. King *is* actually innocent of the § 924(c) crime. Where a factual predicate and element of the crime—the erstwhile crime of violence—no longer exists, and when the conduct of a

defendant does not violate the law, he is actually innocent. *See United States v. Bowen*, 936 F.3d 1091, 1110 (10th Cir. 2019) ("Bowen's witness retaliation convictions do not qualify as crimes of violence under 18 U.S.C. § 924(c) . . . so Bowen is actually innocent . . . The parties agree that Bowen's actual innocence makes his § 2255 motion timely.")

"Actual innocence means factual innocence, not mere legal innocence," but the absence within a § 924(c) count of a valid crime of violence is factual innocence. *Granda v. United States*, 990 F.3d 1272, 1292 (11th Cir 2022) (noting that a petitioner challenging his § 924(c) conviction "would have to show that . . . . his conviction was in fact based on the conspiracy-to-rob predicate"). Because the § 371 conspiracy crime is not a crime of violence, this missing element means Mr. King is actually innocent of his § 924(c) crime.

The government dismissed other counts in exchange for the plea agreement, so Mr. King arguably must establish that he is actually innocent of any "more serious charges." *Bousley*, 523 U.S. at 624. But there are none here. During plea negotiations, the government swapped out two crimes—conspiracy to commit Hobbs Act robbery and armed bank robbery—for one, the § 371 conspiracy. The government also traded out one § 924(c) brandishing count for another. But none of these three charges was "more serious" than the two crimes to which Mr. King pled guilty. At most, the dismissed counts were *equally serious*. The advisory guideline range on the dismissed robbery counts would have been identical (51-63 months in prison) to the

range Mr. King faced on the § 371 conspiracy.[1] The penalty on the dismissed § 924(c) count would have been the very same seven-year prison term Mr. King faced on the § 924(c) count of conviction. Again, per *Bousley*, we must evaluate Mr. King's innocence only on "more serious charges," if any, and not on equally serious charges.[2] Because the dismissed counts here were merely equally serious, we need not prove Mr. King's innocence of those crimes.

Following the published panel opinion, Mr. King filed a petition for rehearing en banc, in which he urged the entire Eleventh Circuit to adopt an actual-innocence exception to the collateral-attack waiver. The court denied the petition.

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[1] Although the dismissed robbery counts had higher statutory maximum sentences than the § 371 count (20 and 25 years, rather than five years), the proper barometer of seriousness is the guideline range. *United States v. Caso*, 723 F.3d 215, 223 (D.C. Cir. 2013) ("[T]he appropriate measure of the seriousness of an offense must be derived from the Sentencing Guidelines rather than the statutory maximum penalty"); *but see United States v. Scruggs*, 714 F.3d 258, 265-66 (5th Cir. 2013) ("We assess seriousness by the cumulative statutory maximum of all the foregone counts").

[2] *United States v. Johnson*, 260 F.3d 919, 921 (8th Cir. 2001) (concluding that in *Bousley*, the Court meant what it said when it wrote "more serious charges"); *but see Caso*, 723 F.3d at 222 (opting for extra-textual "equally serious" standard, albeit in dicta).

REASONS FOR GRANTING THE PETITION

Most federal criminal cases end in a guilty plea.[3] In many of those plea agreements, the defendant promises not to file a habeas petition for any reason. But what if, in the future, the law changes? When a defendant files a 28 U.S.C. § 2255 motion based upon a rule like *Davis*, he shows that he stands convicted of an act that is no longer a crime. Four circuit courts, including the Eleventh Circuit, would choose to enforce the collateral-attack waiver in the plea agreement and deny relief. But three circuit courts would apply an actual-innocence exception to the waiver and measure the constitutional claim. The latter rule honors the parallel history in this Court of carving actual-innocence gateways through similar procedural hurdles. This Court ought to grant the petition to resolve the deep split in the circuits.

1. The question here—whether actual innocence requires a court to bypass a collateral-attack waiver—is the subject of a deep circuit split.

On this question, the circuits stand divided. The Third, Fourth, and Eighth Circuits have applied the actual-innocence exception to collateral-attack or appeal waivers. On the other side of the debate, the Sixth, Seventh, Ninth,

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[3] *Table 4, U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2022*, U.S. Courts, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf (last visited March 11, 2023) (approximately 90 percent of federal indictments resolved through a guilty plea).

and now Eleventh Circuits have elected to exalt collateral-attack waivers above a winning *Davis* claim.

A. Three circuits have carved an actual innocence gateway through generic collateral-attack waivers.

In this Court and the lower courts, "actual innocence" and "miscarriage of justice" are synonymous phrases. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("In a trio of 1986 decisions, we elaborated on the miscarriage of justice, or "actual innocence," exception.").

For two decades, a pair of circuits have exempted petitioners from waivers when they proved actual innocence. In *United States v. Khattak*, the Third Circuit held that "[w]aivers of appeals, if entered into knowingly and voluntarily, are valid, unless they work a miscarriage of justice," which includes the imprisonment of an innocent person. 273 F.3d 557, 563 (3d Cir. 2001). In *United States v. Andis*, the Eighth Circuit held that "as the miscarriage of justice exception relates to [this] appeal, we reaffirm that in this Circuit a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver." 333 F.3d 886, 891-92 (8th Cir. 2003) (en banc).

And then last month, in *United States v. McKinney*, the Fourth Circuit offered the most recent, and robust, proclamation of the actual-innocence exception, and it did so in case involving a *Davis* claim. 60 F.4th 188, 190 (4th Cir. 2023). Like Mr. King, McKinney was convicted of a § 924(c) crime twinned with a conspiracy. Because when McKinney pled guilty he waived the right to challenge his conviction, the district court denied his § 2255 motion,

although the "conviction was likely invalid." *Id.* at 191. The Fourth Circuit led with this point: "Because Hobbs Act conspiracy does not constitute a predicate 'crime of violence' for a § 924(c) violation, McKinney stands convicted of a crime that no longer exists. Ordinarily, that alone would entitle him to relief on his § 2255 motion." *Id.* at 192. The Fourth Circuit then held that the waiver must not block McKinney from relief. "Under *Davis*, . . . McKinney . . . has made a cognizable claim of actual innocence and so . . . has satisfied the miscarriage-of-justice requirement. Accordingly, McKinney's appeal waiver does not bar his claim for relief." *Id.* at 192-93.

B. Four circuits have enforced a collateral-attack waiver against a winning *Davis* claim in spite of a defendant's actual innocence.

Four circuits, including the Eleventh Circuit, have enforced waivers against *Davis* claims, even when the defendant's § 924(c) conviction is no longer based upon a valid crime of violence. Put another way, this cohort of circuits elevates generic waivers over innocence.

In *Oliver v. United States*, the Seventh Circuit is the lone circuit to expressly hold that plea waivers must be enforced in the face of actual-innocence, although it did so with hardly any explanation. 951 F.3d 841, 847 (7th Cir. 2021). Two other circuits have upheld waivers in the face of *Davis* claims, but expressly chose *not* to address the actual-innocence question. *United States v. Goodall*, 21 F.4th 555, 565 n.6 (9th Cir. 2021); *Portis v. United States*, 33 F.4th 331, 339 (6th Cir. 2022). Yet even there the consensus is tenuous. In *Portis*, a dissenting judge argued in favor of a miscarriage-of-justice exception to a *Davis*

claim, just like the one we propose here. 33 F.4th at 341 n.2 (White, J., dissenting).

The Eleventh Circuit is the final circuit to elevate the waiver above all else. But it did so by expressly opting not to take on the actual-innocence query: "[W]e note that our Circuit has never adopted a general 'miscarriage of justice' exception to the rule that valid appeal waivers must be enforced according to their terms." 41 F.4th at 1368 n.3. And after Mr. King's case, it still hasn't. Yet in a concurring opinion, one judge hinted that in another case he might formally recognize the existence of an actual-innocence gateway through an appeal waiver:

> In my view, the contours of a miscarriage-of-justice exception to the enforceability of a collateral-attack waiver would closely track—if not mirror—the actual innocence exception to the procedural default rule. *See, e.g., Bousley v. United States*, 523 U.S. 614, 623 (1998) (stating that a petitioner's appeal may proceed despite procedural default if he can show his actual innocence).

Id. at 1372 (Anderson, S.J., concurring). So, there is great division among the circuits.

2. This question is of national importance.

This widening circuit split merits this Court's intervention. The question of who may gain *Davis* relief (and who may not) is one of high stakes. A § 924(c) conviction is serious business. The crime induces a sharp, mandatory increase in a defendant's term of imprisonment (a consecutive term of five, seven, or ten years in prison for

a first such violation). Mr. King himself is a good example of the harsh nature of this topic. He has completed both the shorter prison sentence on the conspiracy count (51 months) *and* the consecutive 84-month sentence on the firearm count. He is now serving a longer term of supervised release (five years), than he would without the § 924 conviction. If the district court had granted him relief in this § 2255 motion, Mr. King would have been freed many years ago and completed his term of supervised release by now.

A. The stakes inherent in every 18 U.S.C. § 924 conviction are high.

But this question is much larger than any one man. Section 924(c)-related questions recur in every district and circuit all over the nation. During the year this Court issued the *Davis* opinion, the federal government convicted 3,142 offenders of at least one count of § 924(c), and acquired an average total sentence of 138 months in prison.[4] The § 924(c) prosecutions are distributed all over the map. During that fiscal year, for example, the top five districts accounted for only 25 percent of the national total. In short, the harsh crime is prosecuted everywhere, and cries out for uniformity.

As the Court knows, it has chosen to resolve § 924(c)-related questions in at least a dozen opinions, including

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[4] *Quick Facts—18 U.S.C. § 924(c) Firearms Offenses (FY 2015-2019)*, U.S. Sentencing Comm'n, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY19.pdf (last visited March 11, 2023).

Davis, of course, but also in *Deal v. United States*, 508 U.S. 129 (1993); *Smith v. United States*, 508 U.S. 223 (1993); *Bailey v. United States*, 516 U.S. 137 (1995); *Muscarello v. United States*, 524 U.S. 125 (1998); *Watson v. United States*, 552 U.S. 74 (2007); *Dean v. United States*, 556 U.S. 568 (2009); *Abbott v. United States*, 562 U.S. 8 (2010); *United States v. O'Brien*, 560 U.S. 218 (2010); *Alleyne v. United States*, 570 U.S. 99 (2013); *Rosemond v. United States*, 572 U.S. 65 (2014); *Dean v. United States*, 137 S. Ct. 1170 (2017); and *United States v. Taylor*, 142 S. Ct. 2015 (2022). Thus, this Court has already recognized many times that a § 924(c) question is inherently one of national importance.

The harm from the Eleventh Circuit's (and the several other circuits') mistake on this waiver topic will grow unless the Court grants certiorari to clarify the law. District courts within the Eleventh Circuit, Mr. King's home circuit, already "lead the pack in imposing sentences under these enhancement statutes," including both the ACCA and § 924(c). *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (en banc) (Jill Pryor, J., dissenting). The Sentencing Commission's data showed that in 2016, for example, only the district courts of the Fourth Circuit surpassed those of the Eleventh Circuit in handing down sentences under § 924(c). *Id.* at 1213 n.2. For that reason, "[i]t is critically important that [the Eleventh Circuit] of all circuits get this right." *Id.* But it has not. Only this Court can remedy that error.

B. The Eleventh Circuit's rule undermines this Court's retroactivity jurisprudence and Congress's AEDPA policy choices.

The harm to this Court's interests, too, is tangible. The Eleventh Circuit's rule effectively negates any effect of new substantive rules like *Davis*. Where a defendant has signed a collateral-attack waiver, he will be forever barred from relief. The Eleventh Circuit rule here undermines this Court's jurisprudential rules on retroactivity. *See, e.g., Welch v. United States*, 578 U.S. 120, 129 (2016) (substantive retroactive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the [government's] power to punish"). It also undercuts to the point of irrelevance Congress's own work in 28 U.S.C. § 2255(h)(2) (allowing second or successive motions invoking "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

3. This case is a strong vehicle for the Court to answer the question presented.

This case is an excellent vehicle for the Court to answer the question presented. Mr. King advocated below that actual innocence ought to serve as a gateway through the generic collateral-attack waiver, and the appeals courts passed judgment based solely upon that very waiver.

One more point: Mr. King, although he has been released from prison, continues to suffer from the *Davis* error because he is serving a five-year term of supervised

release due only to the § 924(c) count. If that count were vacated, he would spend no more than three years under court supervision on the remaining § 371 conspiracy count, a Class D felony. 18 U.S.C. § 3583(b)(2).

4. Actual innocence must cut a gateway through a collateral-attack waiver, and the Eleventh Circuit and three other circuits are wrong to say otherwise.

Innocence *is* relevant. And it always has been. This Court has already held that actual innocence serves as a gateway through the other common procedural obstacles: procedural default and the statute of limitations. It is time to add collateral-attack waivers to the list of gateways.

A. The case for an actual-innocence exception to generic collateral-attack waivers.

When a defendant files a 28 U.S.C. § 2255 motion based on a new, retroactive rule of constitutional law, like *Davis*, he does not quarrel with validity of the collateral-waiver itself. He asks only that in this rare instance, the waiver not be enforced.

Here history has proved wrong the parties' understanding of the law at the time of the plea. By definition, a retroactive rule like *Davis* is both new (it was not dictated by precedent) and substantive (it narrowed the scope of criminal conduct targeted by § 924(c)). The rule in *Davis* means that a defendant like Mr. King, whose § 924(c) conviction is based on the possession of a firearm during a Hobbs Act conspiracy, is serving a federal sentence for conduct that is not a crime.

One may say that Mr. King must keep the old promises he made, even if it means he will remain imprisoned for acts that the law does not criminalize. He must live with the bargain he struck. This is the perspective adopted by the Eleventh Circuit and by the Sixth, Seventh, and Ninth Circuits. But that view betrays certain foundational principles in our system, and is simply wrong.

"Equitable principles have traditionally governed the substantive law of habeas corpus" and, indeed, it "is an area of the law where equity finds a comfortable home." *Holland v. Florida*, 560 U.S. 631, 646-647 (2010). With that in mind, this Court has held that a habeas petitioner who is actually innocent may pass through various "gateways," which provide exceptions to certain procedural obstacles.[5] This Court first carved out the actual-innocence exception to excuse procedural defaults. *Schlup*, 513 U.S. at 314-315, 327-328. More recently, the Court applied the gateway to forgive petitioners who missed the AEDPA's one-year statute of limitations. *Perkins*, 569 U.S. at 392. These gateways are not controversial, nor should they be.[6]

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[5] The Court coined the "gateway" metaphor nearly thirty years ago. *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

[6] "The Court's recognition of an 'actual innocence' gateway through defenses to habeas corpus relief is neither surprising nor controversial." 1 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 2.5 at 100-101 (7th ed. 2017). Even before *Schlup* and *McQuiggin*, the Court endorsed an actual-innocence exception in the context of capital sentencing. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

The Court expressed the spirit of the actual-innocence exceptions when it said this:

> [A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

Perkins, 569 U.S. at 392. Through these exceptional (and rare) actual-innocence portals, this Court "see[ks] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324. The Court carved a path through Congress's one-year statute of limitations in order to show "sensitivity to the injustice of incarcerating an innocent individual." *Perkins*, 569 U.S. at 393. Why should that sensitivity to injustice be any less when the obstacle is not an Act of Congress, but merely a collateral-attack waiver between the parties? It should not.

But what about a third procedural bar: the collateral-attack waiver? If the motivation of *Schlup* and *Perkins* is "to see that federal constitutional errors do not result in the incarceration of innocent persons," then one is hard-pressed to see why the gateway ought not apply to generic plea waivers.

Federal courts have a compelling interest in preserving the judicially-created doctrine of procedural default (a

doctrine meant to honor the strong interests in finality and comity), or in enforcing the law penned by Congress, a co-equal branch, in setting out in the AEDPA a one-year limitations period, via 28 U.S.C. § 2255(f). Yet this Court has expressly exempted actually innocent defendants from those important procedural bars. And those institutional interests are stronger than what we see here. In overlooking a collateral-attack waiver in a plea agreement, a court would undermine the interests only of the parties, or rather, of one party, the Department of Justice, who is generally more than capable of protecting its own interests and who, here, is not the party serving time in federal prison. The balance of tradition and equities favor the application of an actual-innocence exception here.

B. The Eleventh Circuit is wrong not to apply an actual-innocence exception to collateral-attack waivers.

The Eleventh Circuit panel here expressly chose not to adopt the actual-innocence gateway in this setting.[7] The panel relied exclusively on the principle that a plea agreement in a criminal case (with its collateral-attack waiver) is a binding contract.

The panel expressed a distaste for disrupting a bargain struck many years ago between Mr. King and the government—a bargain in which both parties mistakenly

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[7] The panel declared that all of this is beside the point, with this short line at the top of a footnote: "[The question of actual innocence] would not be a fit here in any event." *King*, 41 F.4th at 1368 n.4. But, as showed above, *see infra* at 8-10, Mr. King is actually innocent of the § 924(c) crime.

believed Mr. King was guilty of this particular § 924(c) offense:

> If courts step back from the contract-based approach for appeal waivers, it will upset significant reliance interests . . . First, prosecutors. A court's refusal to enforce a waiver as written would "deprive the government of the benefit that it has bargained for and obtained in the plea agreement." As for defendants, ignoring appeal waivers would offer a second chance for some (at least to start), but that move would backfire in the end—if a defendant cannot offer an airtight appeal waiver, a plea bargain will be much harder to strike. Certainty, in short, benefits both prosecutor and defendant.

King, 41 F.4th at 1367. The panel recast Mr. King's claimed innocence as a windfall, and a path that may imperil others:

> Nor would it benefit defendants in the long run if we were to [bypass the waiver here]. Forcing constitutional claims into the statutory-maximum exception would render the promise of waiver virtually meaningless, robbing defendants of a powerful bargaining tool. Defendants who agree to waive their appeals receive the immediate benefit of reduced penalties in return—as King's case shows. But if that waiver becomes contingent, whether the defendant wishes it to be or not, a bargain will be much harder to strike.

Id. at 1369-1370.

It is simply not true that by invoking the retroactive *Davis* opinion Mr. King has caused prospective damage to the government and to defendants everywhere. The panel points to no evidence that prosecutors will suddenly be less motivated to inscribe waivers into plea agreements, simply because many years later the Supreme Court might proclaim that a new rule of constitutional law applies to this very defendant and his own crimes.

We do not dispute the proposition that a defendant may bargain away benefits and must later be held to that bargain. That is certainly true in most settings. But the concern over contractual promises must give way when the petitioner is innocent of the crime to which he once pled guilty. This is a modest proposal. In the context of civil contracts, for example, courts permit escape hatches for "unconscionable" bargains, and it ought to be no different here, where a defendant's long-ago promise has now led him to serve a prison term for an act that is no crime at all.[8] If the law exempts parties from obligations penned into certain civil contracts, where the stakes are lower, then surely rare exemptions ought to apply to contracts signed in criminal cases.

The Eleventh Circuit panel failed to explain why a generic waiver requires that innocent persons must never have their constitutional claims heard. The panel did not

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[8] RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (providing that "a contract or term thereof [may be] unconscionable" and that in the latter case "the remainder of the contract without the unconscionable term" may be enforced) (cited in *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 82 (2010)).

even attempt to convince us that general contract law is more sacred than a defendant's actual innocence.

Why make an exception here for actual innocence? First, with the benefit of hindsight, it can be said that an innocent petitioner's collateral-attack waiver (through which he gave away the right to ever challenge his phantom conviction) was involuntary and uninformed. Second, it can hardly be a windfall when a person simply asks to challenge a conviction for a crime he did not commit. Indeed, if the conviction is insulated from attack by a long-ago waiver, it is the government that gains a windfall—a conviction and sentence that it did not properly earn. That is not a result that we ought to live with in our legal system. Against the general rule that plea bargains must be enforced, innocence is the rare and extraordinary exception. It is time for this Court to say so.

With this panel opinion on the books, this particular procedural hurdle—the collateral-attack waiver—is first among equals in the Eleventh Circuit, set apart from procedural default and timeliness because it is immunized from innocence. But the waiver is not worthy of such treatment. The interests here are no more special than the public policy concerns animating the procedural default doctrine (including finality, comity, and respect for state courts) and the statute of limitations (a statute written, again, by Congress, and permitting no exceptions). In those settings, says this Court, innocence is different. Yes, innocence is different, and it ought to provide that rarest of exceptions to any collateral-attack waiver.

CONCLUSION

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

Respectfully Submitted,

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