

24-5252

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

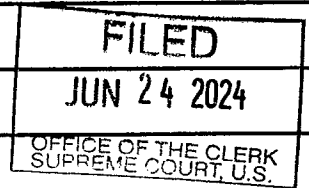
VAUGHN ALEXANDER CROPPER

Petitioner

v.

UNITED STATES OF AMERICA

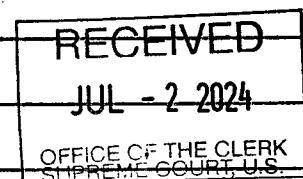
Respondent



ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
(PRO SE)

Vaughn Alexander Cropper
1400 Dale Bumpers Road
FCI Forrest City Low
P.O. Box 9000-Low
Forrest City, Arkansas 72336
(Incarcerated)



QUESTIONS PRESENTED FOR REVIEW

1) Does the actual-innocence-of-sentence exception to the procedural-default rule extend to the noncapital sentencing context?

2) May legal innocence constitute a miscarriage of justice?

LIST OF RELEVANT PROCEEDINGS

In the U.S. District Court for the Northern District of Alabama (Southern Division);
Case No. 2:17-cr-030; UNITED STATES OF AMERICA v. VAUGHN ALEXANDER CROPPER.

(i) 01/25/2017 - Indictment filed by Government;

(ii) 04/10/2017 - First Day of Trial;

(iii) 04/11/2017 - Second Day of Trial (verdict of guilty as to Count One);

(iv) 08/10/2017 - Sentencing Proceeding (188 months' imprisonment, 60 months' supervised release);

(v) 08/11/2017 - Notice of Appeal filed by CROPPER.

In the U.S. Court of Appeals for the Eleventh Circuit; Appeal No. 17-13619; 812 Fed. Appx. 927;
UNITED STATES OF AMERICA v. VAUGHN ALEXANDER CROPPER.

(vi) 05/04/2020 - Judgment entered and Opinion issued as to CROPPER.
Decision: Affirmed. Opinion type: Non-published. Opinion method: Per Curiam.

(vii) 05/22/2020 - Petition for Rehearing En Banc filed by CROPPER;

(viii) 07/10/2020 - Petition for Rehearing En Banc DENIED.

In the U.S. Supreme Court; 141 S.Ct. 2678; VAUGHN ALEXANDER CROPPER v. UNITED STATES OF AMERICA.

(ix) 05/24/2021 - Petition for Writ of Certiorari DENIED.

In the U.S. District Court for the Northern District of Alabama (Southern Division);
Case No. 2:22-cv-8018; VAUGHN ALEXANDER CROPPER v. UNITED STATES OF AMERICA.

(x) 05/23/2022 - Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255
filed by CROPPER;

(xi) 06/21/2022 - Brief in Support of § 2255 Motion filed by CROPPER;

(xii) 09/23/2022 - Response to CROPPER's § 2255 Motion filed by Government;

(xiii) 11/16/2022 - Reply Brief in Supplement to § 2255 Motion filed by CROPPER;

(xiv) 02/13/2023 - CROPPER's § 2255 Motion DENIED, Certificate of Appealability GRANTED;

(xv) 03/06/2023 - Notice of Appeal filed by CROPPER.

In the U.S. Court of Appeals for the Eleventh Circuit; Appeal No. 23-10701;
VAUGHN ALEXANDER CROPPER v. UNITED STATES OF AMERICA.

(xvi) 03/06/2023 - CROPPER's Habeas Appeal Docketed;

(xvii) 04/24/2023 - Appellant's Brief filed by CROPPER;

(xviii) 08/25/2023 - Appellee's Brief filed by Government;

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(ix) 09/18/2023 - Appellant's Reply Brief filed by CROPPER;

(xx) 04/04/2024 - Judgment entered and Opinion issued as to CROPPER.

Decision: Affirmed. Opinion type: Non-published. Opinion method: Per Curiam

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"B" - Eleventh Circuit's Opinion in Appeal No. 23-10701 (Apl. Doc. 29) (8 pages).

"C" - Full Text of 28 U.S.C. § 2255.

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CITATION TO OPINION

A copy of the Opinion of the U.S. District Court for the Northern District of Alabama, dated February 13, 2023, is attached as Appendix "A." A copy of the Opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated April 1, 2024, is attached as Appendix "B." Petitioner's cases were not published in the Federal Reporter.

JURISDICTIONAL STATEMENT

The date of the Opinion sought to be reviewed is April 1, 2024. As Petitioner requests this Honorable Court's review of a matter arising from the U.S. Court of Appeals for the Eleventh Circuit, this Honorable Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VIII:

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

18 U.S.C. § 922. Unlawful Acts:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Former 18 U.S.C. § 924(a)(2):

Whoever knowingly violates subsection (a)(b), (d), (g), (h), (i), (j), or (o) of section 922 [18 U.S.C. 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924. Penalties:

(a)(8) Whoever knowingly violates subsection (d) or (g) of section 922 [18 U.S.C. 922] shall be fined under this title, imprisoned for not more than 15 years, or both.

(e)(1) In the case of a person who violates section 922(g) of this title [18 U.S.C. 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person

shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(c)(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USC §§ 70501 et seq.], for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacture, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

28 U.S.C. § 2254. Finality of Determination

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(b)(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless --

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(b)(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(h)(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence.

See Appendix "C."

28 U.S.C. § 2255(h). See Appendix "C."

STATEMENT OF THE CASE

• Course of Proceedings.

On January 25, 2017, the petitioner, Vaughn Alexander CROPPER, was indicted on one count of being a felon-in-possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Cr. Doc. 1.¹ CROPPER proceeded to trial which began on April 10, 2017. Cr. Doc. 39-44. On April 11, 2017, the jury found CROPPER guilty as to Count One. Cr. Doc. 47; Cr. Doc. 77 at 5, para. 4.

On August 10, 2017, CROPPER was sentenced, as an Armed Career Criminal, to a term of 188 months' imprisonment to be followed by 60 months of supervised release. Cr. Doc. 79. CROPPER timely appealed his conviction and sentence to the U.S. Court of Appeals for the Eleventh Circuit. See *United States v. Cropper*, 812 Fed. Appx. 927 (11th Cir. 2020). On May 4, 2020, a three-judge panel of the Eleventh Circuit entered judgment and issued its unpublished per curiam Opinion, affirming CROPPER's conviction and sentence. See *id.*

¹ Citations to all documents filed in the lower courts are to the file-stamped page number located at the top of each page. "Cr. Doc." denotes citation to the docket in CROPPER's underlying criminal case, No. 2:17-cr-030. "Civ. Doc." denotes citation to the docket in CROPPER's habeas case, No. 2:22-cv-8018. "App. Doc." denotes citation to the appellate docket in Appeal No. 23-10701.

On May 22, 2020, CROPPER filed a Petition for Rehearing En Banc. See Appeal No. 17-13619-JJ.

On July 10, 2020, the Eleventh Circuit denied CROPPER's Petition for Rehearing En Banc. See id. CROPPER

timely filed a Petition for Writ of Certiorari to this Honorable Court, which was denied on May 24, 2021.

Cropper v. United States, 141 S.Ct. 2678 (2021).

On May 23, 2022, CROPPER timely filed a Motion to Vacate, Set Aside or Correct Sentence

pursuant to 28 U.S.C. § 2255. Civ. Doc. 1. On June 21, 2022, CROPPER filed his Brief in support of his

§2255 motion. Civ. Doc. 3. The Government filed its Response to CROPPER's §2255 motion on

September 23, 2022. Civ. Doc. 6. On November 16, 2022, CROPPER filed his Reply Brief in supplement to

his §2255 motion. Civ. Doc. 8. On February 13, 2023, CROPPER's §2255 motion was denied. Civ. Doc. 9.

However, CROPPER was granted a Certificate of Appealability (COA). Id. at 26. CROPPER timely filed a

Notice of Appeal on March 6, 2023. Civ. Doc. 10.

CROPPER's habeas appeal was docketed on March 6, 2023. Apl. Doc. 1. The Appellant's Brief

was timely filed by CROPPER on April 24, 2023. Apl. Doc. 10. After receiving several extensions of time

PAGE to file, the Government filed the Appellee's Brief on August 25, 2023. Apl. Doc. 20. CROPPER's Reply

Brief was filed on September 18, 2023. Apl. Doc. 24. On April 1, 2024, a three-judge panel of the Eleventh Circuit entered judgment and issued its unpublished per curiam Opinion, affirming the district court's denial of CROPPER's § 2255 motion. Apl. Doc. 29 and 30. CROPPER now petitions for this Honorable Court's review.

• Statement of Facts.

Following a jury trial, CROPPER was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Cr. Doc. 77. The presentence investigation report (PSR) found that CROPPER qualified as an armed career criminal under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *Id.* at 8-12, paras. 25, 32-34. The ACCA provides a 15-year mandatory-minimum sentence for felon-in-possession defendants with three or more prior convictions for a "violent felony" and/or "serious drug offense" that were "committed on occasions different from one another." 18 U.S.C. § 924(e). The PSR identified three of CROPPER's prior convictions that qualify as "serious drug offenses" for purposes of the ACCA: (1) Possession of Marijuana, First Degree, in CC 2009-00812 (hereinafter "DC-08-3747"),²

² The conviction in Docket No. CC-2009-00812 was obtained under Case No. DC 2008-3747. See Cr. Doc. 77 at 9-10, para. 32. The district court acknowledged that "Docket Nos. CC 2009-00812 and DC 2008-3747 can be used interchangeably." Civ. Doc. 9 at 6 n.2.

(2) Unlawful Distribution of a Controlled Substance, in DC2008-4344 ("DC-08-4344"), and

(3) Unlawful Distribution of a Controlled Substance, in DC2008-4345 ("DC-08-4345"). Cr. Doc. 77 at 8-12, paras. 25, 32-34. The same three priors were also listed on CROPPER's indictment. See Cr. Doc. 1.

At sentencing, the district court³ made "specific findings that the defendant had three qualifying felonies which are separate and distinct pursuant to 18 U.S.C. § 924(e)(1)," and found that CROPPER's offense level was 33 and his criminal history category IV, for an advisory guidelines range of 188 to 235 months' imprisonment. Cr. Doc. 98 at 17. CROPPER did not object to the three prior convictions that the PSR identified as "serious drug offenses" being "separate and distinct" for purposes of § 924(e). CROPPER was sentenced to 188 months' imprisonment. Cr. Doc. 79.

After his direct appeal and petition for writ of certiorari were denied, CROPPER filed his habeas motion under 28 U.S.C. § 2255. Civ. Doc. 1. As relevant here, CROPPER argued that his sentence was improperly enhanced under the ACCA because "two of the three priors that were used as ACCA predicates actually occurred at the same time and place during a single criminal episode." Civ. Doc. 3 at 5.

³ The Honorable Virginia E. Hopkins, U.S. Senior District Judge for the Northern District of Alabama.

CROPPER's §2255 motion requested that the district court grant him resentencing without the ACCA

enhancement. Civ. Doc. 1 at 12; see also Civ. Doc. 3 at 15-16.

Judicial records pertaining to the three priors were submitted to CROPPER by the Government as part of its discovery disclosure. Civ. Doc. 3 at Ex. C (at 39) ("Discovery Index" listing three "Certificates of Exemplification"); Id. at Ex. D-F (at 41-66) (court records associated with DC-08-3747, DC-08-4344, and DC-08-4345). CROPPER's single-criminal-episode claim (hereinafter "S-C-E claim") is premised on his argument that the date of the offense stated in the charging information of DC-08-3747 is erroneous. Id. at 6-9.

"When analyzing the charging information in each case, it appears that the offense in [DC-08-3747] occurred on February 22, 2007; the offense in [DC-08-4344] occurred on September 12, 2008; and the offense in [DC-08-4345] occurred on September 19, 2008; creating the semblance that all three offenses occurred on different occasions... However, the information in [DC-08-3747]... is erroneous with respect to the date of the offense." Id. at 6; see id. at 44, 52, and 61; see also Cr. Doc. 77 at 9-12, paras. 32-34.

CROPPER presented "new evidence" to corroborate his S-C-E claim. Id. at Ex. J

(at 94-105). This "new evidence" is a brief, filed in the Court of Criminal Appeals of Alabama by

the State of Alabama, Attorney General's office, in which the State admitted that "a clerical error occurred on Cropper's intent to plead to information in DC-08-3747 with the date of February 22, 2007 being stated, which did not match the date on the complaint in DC-08-3747 of September 19, 2008, on which the crime occurred." ⁴Id. at 99. The charging information of DC-08-4345, as well as the PSE, states that the offense in DC-08-4345 also occurred on September 19, 2008, the same day that he committed the offense in DC-08-3747. Id. at Ex. F (at 61); Cr. Doc. 77 at 11, para. 34. CROPPER's argument intended to show that the offenses in DC-08-3747 and DC-08-4345 would not have appeared separate and distinct without the clerical error because both charging instruments in those cases would have shown "September 19, 2008" as the date-of-offense, and thus CROPPER would not have been subject to a sentence enhancement under the ACCA. Civ. Doc. 3 at 5-11.

CROPPER emphasized that the clerical error made the charging information in DC-08-3747, Civ. Doc. 3 at Ex. D (at 44), an unreliable Shepard document, and that the information at paragraph 32

⁴The Alabama AG's Brief is "new evidence" because it did not become available until after CROPPER's federal direct appeal concluded. The Alabama AG's Brief was filed on November 16, 2020. Civ. Doc. 3 at 94, 105. CROPPER's direct appeal concluded May 4, 2020. See Cropper, 812 Fed. Appx. 927.

of CROPPER's PSR, Cr. Doc. 77 at 9-10, was derived from that faulty Shepard document, thus making the clerical error a "fundamental defect which inherently result[ed] in a complete miscarriage of justice" and "presents exceptional circumstances that justify relief" under 28 U.S.C. § 2255, as it resulted in a sentence that exceeds the maximum statutory punishment for CROPPER's offense, based on an enhancement that he would never have been subject to had the clerical error not existed. Civ. Doc. 3 at 11-13 (quoting *Davis v. United States*, 417 U.S. 333, 346-47 (1974)); see also Civ. Doc. 8 at 14. CROPPER argued that, because the offenses in DC-08-3747 and DC-08-4345 both occurred on the same day at the same time and place, the two offenses constitute a single criminal episode pursuant to *Wooden v. United States*, 142 S.Ct. 1063 (2022), and qualify as a single predicate for ACCA enhancement purposes, leaving the Government with a total of two ACCA predicates to rely upon when adding the distribution offense in DC-08-4344. See Civ. Doc. 3 at 9-15; Civ. Doc. 8 at 5.

CROPPER conceded that he did not raise his S-C-E claim on direct appeal. Civ. Doc. 1 at 4;

Civ. Doc. 3 at 16; Civ. Doc. 8 at 10-11. However, CROPPER argued that his S-C-E claim should be decided on

the merits because he "is actually innocent of being an Armed Career Criminal." Civ. Doc. 8 at 13.

The district court⁵ denied CROPPER's §2255 motion. Civ. Doc. 9. The district court acknowledged

that the Alabama AG's brief conceded that the aforementioned clerical error occurred, and that the offense in

DC-08-3747 actually occurred on September 19, 2008. Id. at 14-15. The district court also pointed out,

sua sponte, that the judicial records "submitted by the Government indicate that the offense in [DC-08-3747]

occurred on September 19, 2008, as opposed to February 22, 2007." Id. at 17-18 (citing Civ. Doc. 3 at 42).

However, the district court did not address the merits of CROPPER's S-C-E claim as it determined that his claim

was procedurally defaulted because "he" did not bring his claim on direct appeal and has not established an

exception to the procedural default rule." Id. at 17.

Moreover, the district court acknowledged that CROPPER was not arguing actual innocence of

his underlying felon-in-possession conviction, but rather argued that he was actually innocent of his

sentence enhancement under the ACCA. Id. at 18. The district court noted that the question of whether the

actual-innocence-of-sentence exception extends to the noncapital sentencing context has not yet been

decided by the Supreme Court of the United States (SCOTUS) or the Eleventh Circuit. Id. (citing

Mckay v. United States, 657 F.3d 1190, 1197 (11th Cir. 2011)). Accordingly, the district court denied CROPPER's S-C-E claim under the procedural default rule, but granted CROPPER a CDA with regard to the issue of whether his case is truly extraordinary and requires the consideration of his procedurally defaulted claim. *Id.* at 19, 26.

CROPPER exercised his CDA by timely filing a Notice of Appeal, Apl. Doc. 1, and then timely filing the Appellant's Brief, Apl. Doc. 10. Pursuant to *Mckay*, 657 F.3d at 1195, the Eleventh Circuit must first address any issue of procedural default before addressing the issues enumerated in the CDA. Accordingly, as relevant here, CROPPER argued that his procedurally defaulted S-C-E claim should be addressed on the merits because he satisfies the actual-innocence exception to the procedural default rule.

Apl. Doc. 10 at 25-32. CROPPER's actual-innocence argument on appeal did three things in particular. First, it attempted to persuade the Eleventh Circuit to extend the actual-innocence-of-sentence exception established by the SCOTUS in *Sawyer v. Whitley*, 505 U.S. 333 (1992), to the noncapital sentencing context. See Apl. Doc. 10 at 25-28. Secondly, CROPPER's argument attempted to show the Eleventh Circuit that the different-occasions inquiry under 18 U.S.C. § 924(e)(1) is a question regarding the factual nature of the

ACCA-predicate offenses as opposed to their legal nature. *Apl. Doc. 10* at 29-30, 32. Lastly, and most importantly, CROPPER's argument attempted to show the Eleventh Circuit that he is factually innocent, and thus actually innocent, of committing all three prior "serious drug offenses" on "occasions different from one another." 18 U.S.C. § 924(c)(1). See *Apl. Doc. 10* at 28-32.

In addition to his actual-innocence-of-sentence claim, CROPPER presented other reasons why his case is truly extraordinary and requires the consideration of his procedurally defaulted claim. *Apl. Doc. 10* at 33-41. CROPPER asserted that the defective Shepard document in his case is an unprecedented issue which makes his case truly extraordinary. *Id.* at 33-34. CROPPER argued that the clerical error caused violation of his Fifth Amendment due-process right to be sentenced based on accurate information and resulted in an excessive sentence that must be set aside because it is substantively unreasonable. *Id.* at 33-37. CROPPER concluded by arguing that the clerical error is an "error of fact" that has resulted in an excessive sentence which is an "error of law" and is inherently a manifest "miscarriage of justice" entitling CROPPER to relief under § 2255, even if he is only legally innocent. *Id.* at 37-41.

In his appellate Reply Brief, CROPPER highlights that both the district court and the

Government agree that the Alabama AG's brief concedes the aforementioned clerical error. *Apl. Doc. 24 at 13-14.*

See *Civ. Doc. 6 at 5*; *Civ. Doc. 9 at 14-15*. In addition to the Alabama AG's brief that CROPPER presented as

"new evidence," two Shepard-approved sources indicate that CROPPER committed the offenses in DC-08-3747

and DC-08-4345 on the same day: "OFF: 09/19/2008." See *Civ. Doc. 3 at 42 and 59*. CROPPER's PSR also

shows that he was arrested for the possession offense in DC-08-3747 on "09/19/2008," and that he

committed the distribution offense in DC-08-4345 "on or about September 19, 2008." *Cr. Doc. 77 at 9-11,*

paras. 32 and 34; see *Civ. Doc. 3 at 9 n.2*. Therefore, "[t]he preponderance of the evidence... shows that

the offenses in DC-08-3747 and DC-08-4345 both occurred on September 19, 2008." *Apl. Doc. 24 at 17.*

CROPPER argued that commonsensical analysis will reveal that the offenses in DC-08-3747 and

DC-08-4345 occurred simultaneously pursuant to *Wooden*, 142 S.Ct. at 1069-71. See *Apl. Doc. 24 at 17*;

see also *Civ. Doc. 3 at 13-15* (explaining that the marijuana possession for other than personal use in

DC-08-3747 and the marijuana distribution in DC-08-4345 were interdependent and intertwined, sharing

a common scheme and purpose). CROPPER intended to show that, upon acknowledgment of the clerical

error and substituting it with the correct date, there is no evidence suggesting a temporal break

between the two offenses and thus he has met his burden to prove his actual innocence of 18 U.S.C. § 924(e)(1)'s

different-occasions element. *Apl. Doc. 24 at 15-18.*

The Eleventh Circuit determined that CROPPER's claim is a claim of legal innocence, and as such, his claim is foreclosed by *Williams v. Warden*, 713 F.3d 1332, 1345-46 (11th Cir. 2013). See

Apl. Doc. 29 at 8. CROPPER's argument that he suffers a manifest miscarriage of justice despite mere legal innocence was not addressed by the appellate panel. See *id.* generally.

Additionally, CROPPER raised a Brady claim in his § 2255 motion. See *Civ. Doc. 1 at 5*; *Civ. Doc. 3 at 17-20.* CROPPER's Brady claim was addressed and denied on the merits by the district court, and was irrelevant to his COA. *Civ. Doc. 9 at 20-24, 26.* Moreover, the lower courts determined that CROPPER could not show cause for failing to raise his S-C-E claim on direct appeal. *Id. at 16-18*; *Apl. Doc. 29 at 7-8.* All

nondefaulted claims for relief and grounds for cause to excuse the procedural default have been addressed by the lower federal courts. *Dretke v. Haley*, 541 U.S. 386, 393-94 (2004). Therefore, the issue of whether

the actual-innocence-of-sentence exception extends to the noncapital sentencing context is ripe for

REASONS FOR GRANTING PETITION

1) To Resolve Splits Among the Sister Circuits.

In *Sawyer*, the SCOTUS decided that a habeas petitioner can establish actual innocence of a capital sentence by showing "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."

505 U.S. at 336. In *Dretke*, 541 U.S. at 388-89, the SCOTUS declined to answer whether *Sawyer*'s actual-innocence-of-sentence exception extends to the noncapital sentencing context. This Honorable Court has an opportunity to decide the question here.

Neither the DC Circuit nor the Third Circuit has decided the question. However, the Third Circuit has expressed that, in order to apply the exception in the noncapital sentencing context, a defendant would have to prove that "some factual finding at sentencing was erroneous." *Cristin v. Brennan*, 281 F.3d 404, 422 (3d Cir. 2000). Both the First Circuit and the Eleventh Circuit have declined to decide the question, only entertaining the question for arguments sake. See *Damon v. United States*,

The Eighth and Tenth Circuits have explicitly held that the actual-innocence-of-sentence exception is limited to the capital sentencing context. *Embrey v. Hershberger*, 131 F.3d 739, 740 (8th Cir. 1997) (en banc) ("[W]e think that *Sawyer*, in terms, applies only to the sentencing phase of death cases."); *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993) ("A person cannot be actually innocent of a noncapital sentence..."). Although the Sixth Circuit has not published an opinion on the subject, it has at least one unpublished opinion that follows the lead of the Tenth Circuit in *Richards*, supra, precluding the availability of the actual-innocence exception in the case of a challenge to a noncapital sentence. See *Elahardy v. United States*, Case No. 95-5281 (6th Cir. Sept. 27, 1995).

On the other hand, the Second and Fourth Circuits have held that the actual-innocence-of-sentence exception does apply in the noncapital sentencing context. *Spence v. Superintendent*, 219 F.3d 162, 171-72 (2d Cir. 2000) (holding that the actual-innocence exception applies to noncapital sentencing when a predicate act for enhancement is at issue and the petitioner "is actually innocent of the conduct on which his sentence is based."); *United States v. Maybeck*, 23 F.3d 888, 892-94 (4th Cir. 1994)

(holding that petitioner was actually innocent of a career-offender sentencing enhancement.);

United States v. Mikalajunas, 186 F.3d 490, 494-95 (4th Cir. 1999) (limiting *Maybeck* to claims of actual innocence of career or habitual offender sentences).

The Fifth, Seventh, and Ninth Circuits have ruled both ways on the issue. *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (holding that an actual-innocence-of-sentence claim, which challenged a noncapital sentence, could not excuse an abuse of the writ) cf. *Haley v. Cockrell*, 306 F.3d 257, 264-66 (5th Cir. 2002) (agreeing with the Fourth Circuit's *Mikalajunas* opinion, holding that the exception applies in the noncapital sentencing context only to claims of actual innocence of career or habitual offender sentences),

vacated sub nom. Dretke, 541 U.S. at 388-89; *Mills v. Jordan*, 979 F.2d 1273, 1279 (7th Cir. 1992)

(holding that "the actual innocence exception applies to habitual offender proceedings... whether or not they involve the possibility of capital punishment"), cf. *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997)

(holding that actual innocence does not excuse procedural defaults in the noncapital sentencing context),

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir. 1997) (same as *Hope*, *supra*) cf. *Allen v. Ives*,

950 F.3d 1184, 1188-89 (9th Cir. 2020) (applying the exception to allow a petitioner's claim under

28 U.S.C. § 2241, challenging his career offender status, to be considered on the merits). These circuit

splits can only be resolved by this Honorable Court.

2) To Rectify and Avert Manifest Miscarriages of Justice.

The Sawyer Court held that a postconviction court could reach the merits of a constitutional claim, even though the petition was successive, if the petitioner could show that he was "innocent of the death penalty." 505 U.S. at 349. Notwithstanding, every circuit that has denied the actual-innocence exception in the noncapital sentencing context, post-Sawyer, has done so only with regard to habeas petitions that were second or successive in nature. See Flores, supra (denying the availability of the actual-innocence-of-sentence exception to a claim raised in a successive §2255 motion); Flahardy, supra (same); Hope, supra (same); Embrey, 131 F.3d 739 (same); Greenawalt, supra (same, with regard to §2254 motion); Richards, 5 F.3d 1369 (same as Flores); Reid v. Oklahoma, 101 F.3d 628, 629-30 (10th Cir. 1996) (same as Greenawalt). Perhaps Sawyer's exception cannot survive the subsequent statutory amendments

made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) which limit a federal court's consideration of second or successive habeas petitions, 28 U.S.C. §2244(b) and §2255(b). However, said

initial habeas petitions such as CROPPER's § 2255 motion.

Most circuit courts that have actually applied the actual-innocence exception to noncapital sentencing challenges, and granted relief, have done so with regard to claims raised in first-time federal habeas petitions. See *Spence*, 219 F.3d at 165-72, 175; *Maybeck*, 23 F.3d at 890, 892-94; *Hailey*, 306 F.3d at 259-61, 264, 267-68. The outlier is the Ninth Circuit's decision in *Allen v. Ives*, 950 F.3d 1184, which held that an inmate was entitled to file a petition under § 2241 because he made a cognizable claim that he was actually innocent of a career-offender sentencing enhancement, and that he had not had an unobstructed procedural shot at presenting the claim, although he did not raise the claim in his initial habeas motion under § 2255, because the claim did not become available until after his § 2255 motion was denied. Of all the circuit courts that have applied the exception in the noncapital sentencing context, the Fourth Circuit's reasoning in its *Maybeck* opinion is most persuasive.

• Why the Exception Should Apply to Noncapital Sentencing Cases.

There is no part of the *Sawyer* Court's opinion that forecloses the application of the

actual-innocence-of-sentence exception to noncapital sentencing cases. Applying the actual-innocence

exception to the aggravating factors of a capital sentencing case is functionally equivalent to applying the exception to aggravating factors enhancing a noncapital sentence under the ACCA. See *Maybeck*, 23 F.3d at 893 (applying same logic concerning a claim challenging career offender status under the sentencing guidelines). Applying the exception in either case meets the "objective of protecting defendants from sentencing based on elements of crimes for which they are conclusively innocent." *Id.* at 894. It would be "an unacceptable deviation from [the] fundamental system of justice to automatically prevent the assertion of actual innocence simply because a defendant has not observed procedural avenues available to him." *Id.* at 892.

While considering how the exception should apply, the *Sawyer* Court adopted an eligibility test. 505 U.S. at 345-47. Under this test, an individual is either eligible or not eligible to receive a particular sentence. If an individual receives a sentence for which he is not eligible, the eligibility test allows a court to reach the sentence and to correct or vacate the sentence. Nothing in the *Sawyer* opinion precludes application of this eligibility test to the noncapital sentencing context. See

Furthermore, the SCOTUS has implied that the actual-innocence exception may apply to noncapital sentencing cases. See *Smith v. Murray*, 477 U.S. 527, 538-39 (1986) (rejecting the suggestion that the principles of the procedural default rule "apply differently depending on the nature of the penalty" imposed for the violation of criminal laws, and "similarly reject[ing] the suggestion that there is anything 'fundamentally unfair' about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the... sentencing determination"). Moreover, the SCOTUS held that courts should consider only evidence concerning aggravating factors when reviewing an actual-innocence-of-sentence claim. *Sawyer*, 505 U.S. at 344-47. Therefore, the actual-innocence exception should apply in the noncapital sentencing context to claims of actual innocence of the aggravating factors that subject an individual to an enhanced sentence. All of the circuit courts that have extended the actual-innocence exception to the noncapital sentencing context have rectified and/or averted miscarriages of justice by doing so.

• Why the Exception Applies to CROPPER's Procedurally Defaulted Claim.

The §2255 habeas motion at issue here is CROPPER's first. CROPPER's §2255 motion and

his procedurally defaulted S-C-E claim are both non-successive in nature. Therefore, CROPPER's procedurally defaulted §2255 claim is not subject to the abuse-of-the-writ doctrine or the AEDPA provisions that courts have used to deny application of the actual-innocence exception to noncapital sentencing cases.

The *Sawyer* Court considered whether the petitioner was actually innocent of the aggravating factors necessary for a capital sentence. 505 U.S. at 345. Applying the *Sawyer* standard to the instant matter would require this Honorable Court to consider whether CROPPER is actually innocent of the aggravating factors necessary for an enhanced sentence under the ACCA. "The miscarriage of justice exception applies where a petitioner is 'actually innocent' of... the penalty which was imposed." *Sawyer*, 505 U.S. 333, 120 L Ed 2d 269, 276.

The legal term "actual innocence" is defined as "[t]he absence of facts that are prerequisites for the sentence given to the defendant." *Black's Law Dictionary*, 10th Ed., pg. 909. The legal term "miscarriage of justice" is defined as "[a] grossly unfair outcome in a judicial proceeding." *Id.*, pg. 1149. Therefore, if a defendant's sentence was enhanced based on misinformation about aggravating

factors that he is "actually innocent" of, and the sentence he received as a result of said

misinformation exceeds the statutory maximum punishment he could have otherwise received, then, a "miscarriage of justice" has occurred. These are the circumstances CROPPER currently suffers from.⁶

"To be credible," a claim of actual innocence must be based on reliable evidence not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). CROPPER's actual-innocence-of-sentence claim is based on the Alabama AG's brief, which is new and reliable evidence that was not presented at trial or sentencing and clarifies the truth of the clerical error so emphasized throughout CROPPER's §2255 claim.

Said clerical error is "misinformation of constitutional magnitude," *United States v. Tucker*, 404 U.S. 443, 447 (1972), because it "undermined the accuracy" of CROPPER's "sentencing determination,"⁷ *Smith, supra*, and thus violated CROPPER's Fifth Amendment due-process right to be sentenced based on accurate information. *Tucker*, 404 U.S. at 448. The "fundamental-miscarriage-of-justice exception" permits

⁶ Had the clerical error not existed, CROPPER's violation of 18 U.S.C. §922(g)(1) would have subjected him to a maximum of 10 years' imprisonment at the time of his sentencing, pursuant to former §924(a)(2). CROPPER's advisory guidelines range would have been, and still would be, 63-78 months. Instead, the clerical error caused CROPPER to be subject to a mandatory minimum of 15 years' imprisonment under §924(e), with an advisory guidelines range of 188-235 months. This is a gross disparity. Under the recently enacted Bipartisan Safer Communities Act, a violation of §922(g)(1) now carries a maximum of 15 years' imprisonment pursuant to §924(a)(8). However, CROPPER's 188-month sentence still exceeds the maximum punishment allowed for his offense today without the §924(e) enhancement.

review of an actual-innocence-of-sentence claim "if the petitioner shows by clear and convincing evidence that, but for the constitutional error, no reasonable judge or jury would have imposed the sentence that the petitioner received." Black's Law Dictionary, Deluxe 11th Ed., pp. 816; see *Sawyer*, 505 U.S. at 336. The Alabama AG's brief is clear and convincing evidence of the aforementioned clerical error, and but for that misinformation of constitutional magnitude, no reasonable judge or jury would have imposed the ACCA-enhanced sentence that CROPPER received.

The SCOTUS has established that "actual innocence" means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Therefore, whether the actual-innocence-of-sentence exception applies to CROPPER's §2255 claim is contingent upon whether the different-occasions inquiry under 18 U.S.C. § 924(e)(1) is a question of fact or law. The Eleventh Circuit assumes that it is a question of law as the Court determined that CROPPER's actual-innocence-of-sentence claim is a claim of legal innocence, and thus ruled that his claim is foreclosed by *Williams v. Warden*, 713 F.3d 1332, 1345-46 (11th Cir. 2013) (holding that actual innocence refers only

to factual innocence of crimes and that a challenge to whether a prior offense qualified as an ACCA

predicate was a claim of legal innocence). See *Apl. Doc. 29* at 8. However, the petitioner in *Williams* did not argue that he was actually innocent of the different-occasions element of § 924(e)(1). Rather, the petitioner in *Williams* argued that he was actually innocent of the ACCA enhancement because his predicate "burglary convictions should not have been considered violent felonies under the ACCA[.]" which is a claim of legal innocence. *Williams*, 713 F.3d 1346. Therefore, *CROPPER*'s claim is not foreclosed by *Williams*, *supra*, and the Eleventh Circuit's opinion in the instant matter does not properly address *CROPPER*'s claim as it does not address whether *CROPPER* is actually innocent of the different-occasions element of § 924(e)(1).

The issue regarding the nature of the different-occasions is currently pending resolution by this Honorable Court via *Erlinger v. United States*, which asks whether or not the different-occasions inquiry of § 924(e)(1) is a question that must be decided by a jury. If the *Erlinger* ruling establishes that the different-occasions inquiry must be decided by a jury, then the different-occasions inquiry is a question of fact and *CROPPER* is entitled to relief. If the *Erlinger* ruling establishes otherwise, then the different-occasions inquiry is a question of law and this Honorable

Court should uphold the Eleventh Circuit's decision in the instant matter.

• May Legal Innocence Constitute a Miscarriage of Justice?

An excessive sentence is inherently a "miscarriage of justice" by definition. The aforementioned clerical error is a "fundamental defect which inherently result[ed] in a complete miscarriage of justice," *Hill v. United States*, 368 U.S. 424, 428 (1962), because it resulted in an excessive sentence that would not have been imposed otherwise. Therefore, even if CROPPER is only legally innocent of his ACCA-enhanced sentence, he still suffers a manifest miscarriage of justice as his excessive sentence violates the Eighth Amendment protection against the imposition of arbitrary and capricious sentences. Thus, CROPPER's legal innocence of his ACCA-enhanced sentence "presents exceptional circumstances where need for postconviction relief is apparent." *Davis*, 417 U.S. at 346-47.

• Conclusion

For the foregoing reasons, this Honorable Court should GRANT this petition, REVERSE the Eleventh Circuit's ruling, and REMAND with instructions directing the lower courts to re-sentence CROPPER without the ACCA enhancement, or, alternatively, to address his §2255 claim on the merits.

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Respectfully submitted, this 24th day of June 2024.

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s/ Vaughn Cropper

Vaughn Cropper

(Pro se - Incarcerated)

CERTIFICATE OF COMPLIANCE

The foregoing Petition for a Writ of Certiorari complies with the 40-page limit pursuant to

Rule 33.2(b) of this Honorable Court.

CERTIFICATE OF SERVICE

I, Vaughn Alexander Cropper, am an inmate at FCI Forrest City Low. I hereby certify and

affirm that I deposited the foregoing "Petition for Writ of Certiorari," with an attached "Motion to Proceed

In Forma Pauperis," in the institution's internal mail system on this 24th day of June 2024, and that I

mailed said documents via USPS Certified Mail to the Clerk of the U.S. Supreme Court at

1 First Street NE in Washington D.C. 20543, to be filed upon receipt and distributed to all necessary

parties. Tracking Number: 9589-0710-5270-0134-7695-35.

s/ Vaughn Cropper

Vaughn Cropper

(Pro se - Incarcerated)

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