No. 24-_____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN SCOTT WITHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

QUESTION PRESENTED

In *Bousley v. United States*, 523 U.S. 614 (1998), this Court held that when an individual who pleaded guilty to a § 924(c) offense later challenges the validity of that conviction under 28 U.S.C. § 2255, he may excuse procedural default of his claim with a showing of "actual innocence" of the challenged § 924(c) conviction. *Id.* at 623. In addition, the Court said, "[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624.

The Circuits have reached starkly differing conclusions about the purpose and scope of *Bousley*'s added hurdle to the actual-innocence exception to the procedural default rule in the case of plea bargains, with the Fourth, Fifth, and Eighth Circuits permitting a § 2255 petitioner to pursue defaulted claims that the Sixth and Seventh Circuits do not. The question presented is:

> Whether a § 2255 petitioner who pleaded guilty to a charged offense based on conduct that is not a crime and who later seeks to rely on actual innocence to excuse procedural default of a claim for relief from incarceration for the invalid conviction must also show actual innocence of both more serious charges and equally serious charges forgone by the government during plea bargaining.

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

(1) *United States v. Brian Scott Witham*, No. 3:15-cr-177, District Court for the Eastern District of Tennessee. Judgment entered August 18, 2017. (Lead case.)

(2) *United States v. Brian Scott Witham*, No. 3:16-cr-31, District Court for the Eastern District of Tennessee. Judgment entered August 18, 2017. (Transferred from the Middle District of Pennsylvania, No. 3:16-cr-39.)

(3) *United States v. Brian Scott Witham*, No. 3:16-cr-32, District Court for the Eastern District of Tennessee. Judgment entered August 18, 2017. (Transferred from the Western District of North Carolina, No. 1:15-cr-102.)

(4) *United States v. Brian Scott Witham*, No. 3:16-cr-33, District Court for the Eastern District of Tennessee. Judgment entered August 18, 2017. (Transferred from the Western District of North Carolina, No. 1:16-cr-24.)

(5) *United States v. Brian Scott Witham*, No. 3:16-cr-34, District Court for the Eastern District of Tennessee. Judgment entered August 18, 2017. (Transferred from the District of Connecticut, No. 3:16-cr-36.)

(6) *Brian Scott Witham v. United States*, Nos. 3:15-cr-177, 3:20-cv-00277, District Court for the Eastern District of Tennessee. Decision and order denying motion under 28 U.S.C. § 2255 entered October 22, 2021.

(7) *Brian Scott Witham v. United States*, No. 21-6214, U.S. Court of Appeals for the Sixth Circuit. Decision and judgment affirming denial of § 2255 motion entered April 8, 2024.

(8) *Michael Benanti v. United States*, No. 3:20-cv-00194, District Court for the Eastern District of Tennessee. Judgment entered January 6, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND GUIDELINES

No. 24-_____

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Brian Witham respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Sixth Circuit appears at pages 1a to 15a of the appendix to this petition and is reported at 97 F.4th 1027 (6th Cir. 2024). The district court's unpublished decision denying and dismissing Mr. Witham's motion under 28 U.S.C. § 2255 appears along with the accompanying order at pages 16a to 32a of the appendix to this petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals' decision affirming the denial of Mr. Witham's § 2255 motion was entered on April 8, 2024. Pet. App. 1a. This petition is timely filed pursuant to Supreme Court Rule 13.1, as extended by order dated June 23, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides:

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

28 U.S.C. § 2255(a) provides:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

Brian Witham is serving a sentence of 360 months' imprisonment imposed after he pleaded guilty pursuant to a global cooperation agreement resolving numerous federal charges arising in several districts, including three counts of armed bank extortion (or attempted armed bank extortion) offenses and three counts of carjacking. That sentence is composed of a 276-month sentence for all the substantive counts of conviction plus an 84-month consecutive sentence for a count charging him with a violation of 18 U.S.C. § 924(c) for using a firearm during the third attempted armed bank extortions. As part of the plea agreement, the government dismissed

numerous other charges, including five other § 924(c) counts charging him with using a firearm during the other bank extortion offenses and carjacking offenses. As is common in the federal sentencing system, the 276-month sentence for the non-924(c) offenses reflects an increased guideline range for the conduct charged in the five dismissed § 924(c) counts. The conduct underlying the dismissed § 924(c) counts also served as a basis for cutting in half the downward departure Mr. Witham received for his extraordinary cooperation in the government's prosecution of his co-defendant.

After this Court in *United States v. Davis*, 139 S. Ct. 2319 (2019), struck down as void for vagueness the residual clause in § 924(c)(3)(B), upon which Mr. Witham's single § 924(c) conviction was based, he moved to vacate his § 924(c) conviction and sentence under 28 U.S.C. § 2255. But because he failed to previously raise his challenge on direct appeal, his claim was deemed procedurally defaulted, and he was denied permission to proceed under § 2255. The court of appeals held that even if he was actually innocent of the one § 924(c) offense predicated on attempted armed bank extortion for which he was convicted (as the government agreed he was), he could not pursue his defaulted claim unless he *also* showed he is actually innocent of the three equally serious § 924(c) counts predicated on the carjacking offenses that were dismissed as part of his plea negotiations. With this ruling, the Sixth Circuit extended beyond its stated terms the extra hurdle announced in *Bousley v. United States*, 523 U.S. 614 (1998), for overcoming procedural default based on actual innocence in cases involving plea bargains.

The courts of appeals disagree sharply about the showing required before a

court may excuse a petitioner's procedural default based on actual innocence. With the Sixth Circuit's decision in this case, the lower courts have reached a deep and intractable impasse that only this Court can resolve.

This question is extremely important. The vast majority of federal prosecutions are resolved by guilty plea. As it stands, whether a person may obtain post-conviction relief from a conviction for an offense of which they are indisputably actually innocent, or instead must serve time in prison for conduct that is not a crime at all, depends on nothing more than geography. Review should be granted.

A. Legal background

By statute, a federal prisoner may seek post-conviction collateral relief if the sentence violates the Constitution. *See* 28 U.S.C. § 2255(a). But under longstanding rules governing collateral review, a § 2255 petitioner generally cannot raise an argument in a § 2255 motion that he did not first raise on direct appeal of his conviction. *United States v. Frady*, 456 U.S. 152, 167 (1982); *Bousley*, 523 U.S. at 621. This rule, known as the procedural default rule, "is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

The procedural default rule admits of two exceptions, also judge-made. The first allows review of a defaulted claim if the petitioner can show "cause" excusing the default and "actual prejudice" resulting from the claimed error. *Frady*, 456 U.S. at 168. The second exception allows review of a defaulted claim when petitioner shows

he is "actually innocent" "of the charge for which he was incarcerated." *Schlup v. Delo*, 513 U.S. 298, 320-21, 327 (1995) (internal quotation marks omitted). The "actual innocence" exception is premised on the equitable consideration that such a claim for relief implicates a "fundamental miscarriage of justice," so that the "imperative of correcting a fundamentally unjust incarceration" overcomes any requirement of showing cause for the default. *Id.* at 314, 324-37.

In *Bousley*, this Court announced an additional hurdle to overcome in certain cases in which the petitioner pleaded guilty. As stated there, in order to pursue a defaulted claim on collateral review by way of the procedural gateway of "actual innocence," the petitioner who pleaded guilty must show his innocence of not only the challenged count of conviction but also of any "more serious charges" that "the Government has forgone . . . in the course of plea bargaining." 523 U.S. at 624. This stated hurdle, however, did not apply in *Bousley* itself because no charges of any sort were forgone in Bousley's case. *Id.*

B. Proceedings below

1. In 2014, Mr. Witham and his codefendant, Michael Benanti, set out on a crime spree. Before reaching East Tennessee, their series of crimes included a bank robbery in Pennsylvania, an attempted bank extortion in Connecticut, and a Hobbs Act robbery in North Carolina. Once they reached east Tennessee, they continued their activities, invading the homes of three different bank employees, holding their families hostage, and sending the employees to their own banks to perform the

robberies. (Plea Agreement, R. 24.)[1]

The duo was ultimately arrested on November 26, 2015, in Western North Carolina after a car and foot chase that ended in Mr. Witham being struck by a construction truck and trapped beneath it. He was badly burned by the exhaust pipe of the vehicle and suffered several broken bones; he was taken to the hospital before being returned to the Buncombe County, North Carolina, jail where he had his first encounter with the authorities investigating the case. Just 48 hours after his arrest, Mr. Witham agreed to tell them everything he knew. He was debriefed the next day. (Sent'g Tr., R. 253, at 31-33.)

2. Negotiations for a plea agreement began immediately, even before Mr. Witham was brought back to Tennessee and arraigned. (*Id.* at 36.) The first draft of the plea was sent to counsel on January 29, 2016. Informations from the other jurisdictions were signed on February 17, 2016, during another debriefing. His plea agreement was filed, and he pleaded guilty on March 1, 2016, just 97 days after his initial arrest. (*See* Plea Agreement at 25.)

The timeliness and extent of Mr. Witham's cooperation was exceptional. (Response to Gov't Departure Motion at 1-18, R. 224.) Mr. Witham submitted to his first extensive interview with the assistant U.S. Attorney and several federal agents on Saturday, November 28. He revealed his involvement in unsolved crimes that took place in Connecticut and Pennsylvania and described the *modus operandi* of the

[1] All record citations are to Case No. 3:15-cr-177 in the Eastern District of Tennessee, unless otherwise noted.

overall scheme. He accompanied agents to a cache of guns and disguises that had been buried in the side of a mountain and the scene of one of their abandoned cars. (*Id.* at 3-4; Sent'g Tr. at 18.)

His next significant debriefing took place on February 17, 2016. Mr. Witham had forgotten to discuss an additional Hobbs Act robbery at the initial meeting. This robbery, the subject of Case No. 3:16-cr-0033 and to which he later pleaded guilty, would never have been solved had Mr. Witham not brought it to the attention of the agents. (Sent'g Tr. at 35.) That meeting lasted three hours.

3. During all of this, the law governing prosecutions for § 924(c) offenses was in dramatic flux. In 2015, the Court in *Johnson v. United States*, 576 U.S. 591 (2015), had held that the residual clause in the definition of "violent felony" in the Armed Career Criminal Act is unconstitutionally vague. Individuals charged with violating 18 U.S.C. § 924(c) across the country immediately began litigating whether the rule in *Johnson* applies to invalidate the similar residual clause in § 924(c)(3)(B). In the Seventh Circuit, for example, a case raising that question was argued in December 2015, and the court would go on to decide that § 924(c)(3)(B) is materially indistinguishable from the ACCA's residual clause so is also unconstitutionally vague. *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). In contrast, the Sixth Circuit in February 2016 held that *Johnson* did not invalidate § 924(c)(3)(B). *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016).

4. A few weeks after *Taylor* was decided by the Sixth Circuit, and in the midst of the ongoing litigation in the Seventh Circuit and others about the validity of

§ 924(c)'s residual clause, the government entered into a plea agreement with Mr. Witham. On March 1, 2016, Mr. Witham pleaded guilty in the lead Case No. 3:15-cr-177 to two counts of attempted bank robbery by extortion, in violation of 18 U.S.C. § 2113(a), (d), (e) (Counts One and Eleven); one count of bank robbery by extortion, in violation of 18 U.S.C. § 2113(a), (d), (e) (Count Six); three counts of carjacking, in violation of 18 U.S.C. § 2119 (Counts Two, Seven and Twelve); and one count of using and brandishing a firearm during and in relation to the attempted bank robbery by extortion in Count Eleven, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Thirteen). (*See* Plea Agreement ¶ 1; Presentence Investigation Report ["PSR"] at ¶ 30, R. 216.)[2] In exchange for his guilty plea to these counts, the government agreed to dismiss the remaining counts in the indictment, including two § 924(c) counts (Counts Three and Eight) predicated on two bank extortion counts to which he pleaded guilty and three § 924(c) counts (Counts Four, Nine, and Fourteen) predicated on three carjacking counts to which he pleaded guilty. (*See* Indictment; Plea Agreement ¶1(h); Sent'g Tr. at 66; Judgment, R. 229.)

5. Mr. Witham continued to assist the government. After his co-defendant declared his intention to go to trial, Mr. Witham met with the government for approximately two hours. (Response to Gov't Departure Motion at 4, R. 224.) Another meeting was held on March 11, 2016 with an FBI agent, also lasting approximately

[2] Mr. Witham also pleaded guilty to and was sentenced in this same proceeding for several related charges in E.D. Tenn. docket numbers 3:16-cr-0031, 3:16-cr-0032, 3:16-cr-0033, and 3:16-cr-0034, which are not at issue here.

two hours. (*Id.* at 5.)

Later, in preparation for Mr. Witham's testimony, a two-day debriefing was held in Kentucky on August 24 and 25, 2016. He identified hundreds of physical exhibits. The first day's meeting lasted ten and a half hours; the second day lasted another ten hours. (*Id.*) Mr. Witham was brought to the U.S. Attorney's office on October 19, 2016 for a meeting that lasted approximately seven hours. Additional meetings were held on October 24, lasting eight hours and on October 26, lasting eleven (11) hours. (*Id.*)

A third round of trial preparation for Mr. Witham began on January 6, 2017, when he met with the attorneys and agents for six and a half hours. On January 13th, a five-hour session was held; on Monday, January 19 (Martin Luther King Holiday), they met for eleven hours, on January 19th, eight and a half hours; and on January 20, another eight-and-a-half-hour day. The total number of hours of debriefing and trial preparation added up to over one hundred hours. (Sent'g Tr. at 22, 34.)

Several witnesses would not have been identified without Mr. Witham. The details he provided formed the basis for the Government's direct examinations. The information he gave them tied the evidence together and determined which witnesses were necessary to their case. (*Id.* at 23, 34-35.)

Finally, Mr. Witham testified at trial for four days. The government agreed that his information was truthful and reliable. (*Id.* at 22, 65.) And his cooperation was very public. There were thirty stories about the case in the Knoxville News Sentinel alone, and the case also received national coverage. (Response to Gov't

Departure Motion at 11 & Exh. C, R. 224.)

6. In preparation for Mr. Witham's sentencing, the Probation Office calculated his guideline range to be 360 months to life for the non-924(c) counts in all the cases combined, which were organized into groups for guideline calculation purposes. As relevant here, the offenses committed in the Eastern District of Tennessee and docketed in the lead Case No. 3:15-cr-177 were organized into three groups tied to three bank extortion plots and their accompanying carjacking and other conduct: Group One was comprised of Count 1 (attempted bank extortion) and Count 2 (carjacking), both committed on April 28, 2015; Group Two was comprised of Count 6 (bank extortion) and Count 7 (carjacking), both committed on July 7, 2015; and Group Three was comprised of Count 11 (attempted bank extortion) and Count 12 (carjacking), both committed on October 21, 2015. (Revised Presentence Report (Sealed) ¶¶ 50-56, 59-62, 63-66, 80, 90, 101.)

The guideline offense level for each of these three groups of non-924(c) counts was increased in various way to account for the offense conduct and all "relevant conduct" under U.S.S.G. § 1B1.3, including, for example, a four-level increase because a person was abducted, a two-level increase because bank property was taken, a two-level increase because the offense involved carjacking, and a two-level increase because the offense involved a vulnerable victim. (*See, e.g.*, Group Two, PSR ¶¶ 92, 94, 95, 96, 97.) For Groups One and Two, the offense level was further increased by six levels because a firearm was used during the commission of the offenses, for adjusted offense levels of 34 and 38, respectively. (PSR ¶¶ 83, 89, 93, 100.) For Group

Three, however, there was no similar six-level increase for use of a firearm because Mr. Witham was convicted of the § 924(c) in Count Thirteen based on the attempted bank extortion to which he pleaded guilty in Count Eleven, under the Guidelines' rule that a person gets *either* the six-level guideline increase for the use of the firearm or the applicable statutory mandatory minimum—but not both. (PSR ¶¶ 104, 109.) As a result, the adjusted offense level for Group Three was significantly lower than for Groups One and Two, landing at 30. (PSR ¶ 109.)

Under the Guidelines' Chapter Three grouping rules, because Group Two had the highest adjusted offense level of all the groups (level 38), it served as the starting offense level to which another four levels were added to account for the multiple but less serious counts of conviction (with each additional offense level or portion thereof depending on the relative level of severity of each group), for a combined adjusted offense level of 42. (PSR ¶¶ 139-142.) Though deemed a career offender, Mr. Witham's guideline range under U.S.S.G. § 4B1.1(c) for all the non-924(c) counts from all the districts was still driven by offense level 42 for the non-924(c) offenses, corresponding to a range of 360 months to life. (PSR ¶ 144.) To that range, the mandatory consecutive 84 months for the § 924(c) conviction in Count Thirteen (relating to Group Three) was added, for an aggregate guideline range of 444 months (37 years) to life. (PSR ¶¶ 144, 185.)

7. As part of their plea agreement, the parties agreed that the appropriate sentence before any anticipated reduction for Mr. Witham's cooperation was 504 months (42 years), which was comprised of 420 months for the non-924(c) counts (60

months higher than the bottom of the applicable range of 360 months to life) plus the consecutive 84 months for the § 924(c)(1)(A)(ii) count. (Plea Agreement ¶ 9; PSR ¶ 32.) The government later moved for a downward departure under U.S.S.G. § 5K1.1 to account for Mr. Witham's cooperation, but argued that any reduction for his assistance—which by ordinary district practice might warrant a reduction of upwards to 50 percent—should be lessened in light of the charges that were dismissed as part of the plea agreement. (Sent'g Tr. at 13, 14-19 (suggesting a reduction to 393 months to reflect a 22 percent reduction from the agreed 504-month starting point).)

8. At sentencing, the district court accepted the plea agreement and granted the government's motion for downward departure. It also agreed with the government that the extent of the departure should be lessened in light of the dismissed counts. (*Id.* at 66-67, 70-71.) After taking Mr. Witham's substantial assistance into account, but also discounting the ordinary expected value of that assistance in light of the dismissed charges, the district court sentenced Mr. Witham to a total of 276 months in prison followed by five years of supervised release for the non-924(c) counts of conviction, plus 84 months in prison and three years of supervised release for the § 924(c) conviction in Count Thirteen, to run consecutively to all other counts, for an aggregate sentence of 360 months in prison. (Judgment at 3.) While this sentence was nearly three years shorter than the one the government requested, it was still nine years longer than district practice given the extent of the cooperation involved.

9. Mr. Witham filed a direct appeal, raising the single issue whether the

district court erred by using the dismissed counts to evaluate the value of his substantial assistance, arguing that it violated his right to due process of law. Opening Br. at 5, *United States v. Witham*, Nos. 17-6010, 17-6015, 17-6017, 17-6018, 17-6019 (6th Cir. 2018) (Doc. 22). This Court dismissed Mr. Witham's direct appeal on June 25, 2018 based on his appeal waiver. *See* Order, *United States v. Witham*, Nos. 17-6010, 17-6015, 17-6017, 17-6018, 17-6019 (6th Cir. 2018) (Doc. 34-1). In the process, the Court confirmed that the district court acted within its discretion when it considered dismissed counts to lessen the extent of the downward departure. *Id.* at 2-3.

10. On June 24, 2019, the Supreme Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), striking down as unconstitutional the residual clause in the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B). In striking the clause down, the Court emphasized that "[i]n our constitutional order, a vague law is no law at all." *Id.* at 2324.

11. Within one year of the date *Davis* was decided, on June 23, 2020, Mr. Witham filed a motion for post-conviction relief under 28 U.S.C. § 2255. (No. 3:20-cv-00277, R. 1.) He contended that the attempted bank extortion in Count Eleven, upon which his single § 924(c) conviction and sentence were predicated, is not a "crime of violence" in the absence of the residual clause, and that therefore his § 924(c) conviction must be vacated. (*See id.* at 1.) The district court denied the motion without reaching the merits, concluding that his claim was procedurally defaulted. It reasoned that even if Mr. Witham could show his actual innocence of the challenged

§ 924(c) conviction predicated on attempted bank extortion, because he did not also show his actual innocence of the three dismissed and equally serious § 924(c) counts predicated on the three carjacking counts of conviction, he could not overcome procedural default. (Mem. Op. at 4-14, No. 3:20-cv-00277, R. 10.)

In reaching this conclusion, the district court relied on *Bousley v. United States*, 523 U.S. 614 (1998). In *Bousley*, the Court held that "[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." 523 U.S. at 624. The district court below said that "[t]he same rule applies regarding equally serious dismissed charges." (*See* Mem. Op. at 5, No. 3:20-cv-00277.)

The district court therefore denied the motion, dismissed the civil action, denied Mr. Witham leave to proceed in forma pauperis, and declined to issue a certificate of appealability. (*Id.* at 14-15.)

12. Mr. Witham appealed and was granted a certificate of appealability on the questions whether his *Davis* claim was procedurally defaulted and whether he is entitled to relief on the merits. Meanwhile, the government conceded in the co-defendant's separate § 2255 proceeding after his conviction at trial that a § 924(c) conviction premised on attempted armed bank extortion is invalid in light of *Davis*, and further agreed that he was entitled to relief on those counts despite his procedural default. *See* Gov't Response to 2255 Motion at 60-62, *Benanti v. United States*, No. 3:20-cv-00194-TAV-DCP (E.D. Tenn. Mar. 23, 2021).

13. The Sixth Circuit affirmed.[3] The court accepted that the attempted armed bank extortion underlying the § 924(c) conviction is not a crime of violence in light of *Davis*, and also the parties' agreement that the three § 924(c) counts dismissed as part of Mr. Witham's plea bargain were not "more serious" charges. Pet. App. 7a-8a. It also acknowledged that *Bousley* tells courts "what to do" only in the case of "more serious charges" forgone in plea bargaining. Pet. App. 7a. The court nonetheless followed "each thread of *Bousley*'s reasoning" to conclude that a § 2255 petitioner who pleaded guilty as part of a plea bargain may not avoid procedural default by way of actual innocence unless he can show he is actually innocent of both more serious *and* equally serious charges dismissed as part of the bargain. Pet. App. 8a.

The court reasoned that this approach honors the extraordinary nature of collateral review and the strict limits placed upon it in the case of a guilty plea. Pet. App. 8a. In this special context, it said, extending the actual innocence hurdle to equally serious charges similarly avoids "the unfairness that would result if a petitioner could raise a defaulted challenge to a sentence he bargained for, while escaping punishment for dismissed counts that he actually committed." *Id.* (internal quotation marks and citation omitted). In the lower court's view, this approach is consistent with "[t]he balance struck in *Bousley*," which is "to permit collateral attacks on guilty pleas to avoid injustice to a defendant, not enable a 'windfall.'" Pet.

[3] Mr. Witham's appeal was consolidated for argument and submission with another appeal raising the same question, *Savage v. United States*, Sixth Cir. No. 23-3577.

App. 9a (quoting *Lewis v. Peterson*, 329 F.3d 934, 936 (7th Cir. 2003)). Joining the Seventh Circuit, the court reasoned that only when the government has forgone less serious charges is there strong reason to believe that the defendant was punished more severely as a result of pleading guilty to an invalid count. Pet. App. 9a.

Finally, the court pointed to the case-specific outcome in *Bousley* itself as proof that its rule should apply to equally serious charges in plea bargain cases. There, after stating the added requirement for "more serious" charges, this Court rejected the government's argument that Bousley should have to show actual innocence both of "using" a firearm, the prong of the offense under § 924(c)(1) to which he pleaded guilty, and of "carrying a firearm," a second prong of the offense under § 924(c)(1) with which he was not charged. *Bousley*, 523 U.S. at 616, 624. The Court rejected the government's request because there was "no record evidence that [it] elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty." *Id.* This inquiry, the Sixth Circuit reasoned, "would have been entirely superfluous" if *Bousley* were limited to more serious charges. Pet. App. 9a.

Mr. Witham now seeks review of the critically important question whether a § 2255 petitioner who pleaded guilty to a crime that is not, in fact, a crime and seeks to rely on the actual innocence exception to pursue relief from the sentence imposed for that nonexistent crime must also show he is actually innocent of both more serious *and* equally serious charges forgone by the government during plea bargaining. This question has divided the courts below and warrants the Court's review.

REASONS FOR GRANTING THE PETITION

I. The circuits diverge sharply on the question whether a § 2255 petitioner must show actual innocence of equally serious charges forgone in the course of plea bargaining.

The issue presented here is in dire need of resolution by this Court. It arises from the Court's self-made system of rules and exceptions relating to access to collateral review—all meant to strike an equitable balance between societal interests in finality and conservation of judicial resources and the "imperative of correcting a fundamentally unjust incarceration." *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995) (cleaned up). The lower courts are now deeply divided on the scope of the Court's added hurdle to § 2255 review, as stated in *Bousley*, in cases resolved by plea bargaining where the petitioner seeks to excuse procedural default by way of the actual innocence exception. Those that have added to *Bousley*'s stated rule run headlong into this Court's admonition that judges should tinker with the various exceptions to procedural default "only when necessary." *Dretke v. Haley*, 541 U.S. 386, 394 (2004). Because the lower courts' conflicting applications of *Bousley*'s stated rule can be traced to the absence of explanation for it, and because those views are not likely to change, review is needed to clarify the scope of the rule.

In *Bousley*, the defendant was originally charged with possession of methamphetamine with intent to distribute. 523 U.S. at 616. After he did not immediately plead guilty, the government superseded the indictment to add the additional count of "using" a firearm "during and in relation to a drug trafficking crime" in violation of 18 U.S.C. § 924(c)(1). *Id.* He eventually agreed to plead guilty

to both counts, after which the Supreme Court decided *Bailey v. United States*, 516 U.S. 137 (1995), narrowly construing the "use" prong to require the government to prove "active employment of the firearm." *Id.* at 144. In a § 2255 motion based on *Bailey*, Bousley argued that he was actually innocent of "using" a firearm. *Bousley*, 523 U.S. at 623.

The question presented in this Court was whether a person who pleaded guilty to a § 924(c) offense may collaterally attack his sentence under § 2255 based on *Bailey*. The government agreed that such collateral attacks should be allowed, but argued that for defaulted claims like Bousley's, in addition to showing his actual innocence of "actively employing" the firearm, Bousley should also have to show actual innocence of "carrying" the firearm, *id.* at 624, conduct the government described as just another "manner of commi[tting]" the § 924(c)(1) offense alleged in the indictment. U.S. Br. at 41 & n.21, *Bousley v. United States*, 523 U.S. 614 (1998), 1997 WL 805418. Notably, under the government's proposed rule, Bousley would need to show actual innocence of "carrying" a firearm regardless of whether "carrying" was ever on the bargaining table. *Id.* This would be appropriate, it argued, because a person necessarily "carries" a firearm when he "uses" it. *Id.* at 41 n.21.

This Court held that a § 2255 petitioner who pleaded guilty should be allowed access to § 2255 review of a claimed invalid conviction by way of the actual innocence exception, but it did not adopt the government's proposed added actual innocence hurdle. It first noted that the "actual innocence" inquiry "means factual innocence, not legal insufficiency," which means the government "is not limited to the existing

record to rebut any showing the petitioner might make." *Id.* at 623-24. It then said that "in cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Id.* The Court ruled that its added showing did not apply to Bousley because there was no evidence that a "carrying" charge was forgone in his case. *Id.* at 624.

In this short passage, the Court did not explain why it adopted the extra requirement of showing of actual innocence of "more serious charges." At the same time, the Court seemed to suggest that Bousley would have had to show actual innocence of the "carrying" prong had it been forgone, even though "carrying" under § 924(c)(1) was described as merely a different means of the same § 924(c) offense.

In his dissenting opinion, Justice Scalia provided a strong clue about the Court's rationale. Justice Scalia said that the Court "evidently" adopted the additional actual innocence showing for "more serious" charges in order to avoid a particular form of "absurd" inequity, illustrated by an example: The "wheel-man" in a bank robbery who was actually, factually guilty of felony murder for a killing that occurred during the bank robbery, but who, with the government's agreement, pleaded guilty to voluntary manslaughter based on that conduct to avoid the harsher penalty of felony murder. *Id.* In this scenario, Justice Scalia agreed, it would be an "absurd consequence" to permit the person factually guilty of the felony murder to seek § 2255 relief from his bargained-for conviction for voluntary manslaughter, no matter his legal innocence of the less serious offense. *See id.*

But Justice Scalia's clue still did not explain why Bousley would have had to

show actual innocence of the equally serious "carrying" prong had the government elected not to charge it. With the Court's presumed rationale for its stated rule rendered unclear by its case-specific application (or rather, non-application) of that rule, lower courts are now firmly divided about whether and how it applies when the government has forgone equally serious charges during plea bargaining.

The first division emerged over two decades ago. In 2001, the Eighth Circuit held in *United States v. Johnson*, 260 F.3d 919 (8th Cir. 2001), that a dismissed § 924(c) count that was not more serious than the § 924(c) count invalidated in light of *Bailey* was not subject to *Bousley*'s rule *Id.* at 921. A few years later, the Seventh Circuit held that "[t]he logic of the *Bousley* opinion does not require that the charge that was dropped or forgone . . . be more serious than the charge to which the petitioner pleaded guilty. It is enough that it is as serious." *Lewis v. Peterson*, 329 F.3d 934, 937 (7th Cir. 2003).

Much of the Seventh Circuit's reasoning turned on the assumption that the parties would simply have agreed to use a different § 924(c) charge to reach the same result had they realized that the selected charge was invalid. According to the Seventh Circuit, the parties would have simply switched the guilty plea to a valid § 924(c) count, and the punishment would probably have been the same as the parties intended. *Id.* at 936. To allow the petitioner to later successfully challenge the invalid § 924(c) conviction, it reasoned, would allow him to "get off scot free." *Id.* The court concluded that *Bousley*'s reasoning does not support limiting its rule to cases "in which the dropped or otherwise forgone charge was more serious, rather than as or

more serious, than the charge to which he pleaded guilty." *Id.*

The Fifth Circuit, in contrast, adhered to *Bousley*'s "more serious" language in *United States v. Scruggs*, 714 F.3d 258 (5th Cir. 2013), there in declining to allow a § 2255 petitioner to use the actual innocence exception to access a challenge to an invalid honest-services count in light of *Skilling v. United States*, 561 U.S. 358 (2010). *Scruggs*, 714 F.3d at 266.

The D.C. Circuit addressed the issue in *United States v. Caso*, 723 F.3d 215 (2013), but only in *dicta*. *Id.* at 221-22. The court described *Bousley*'s added hurdle as "ambiguous" because the Court specifically referred to "more serious" charges in its stated rule but then went on to discuss the "as serious" charge of "carrying." *Id.* The D.C. Circuit hypothesized about the rationale for *Bousley*'s rule and the potential equities involved, recognizing in the process that "[t]he dynamics of plea bargaining are complicated—even more complicated if we factor in offenses of equal severity." *Id.* at 223. The court also recognized that courts "should hesitate before adding a condition not included in the express language of the Supreme Court's opinion." *Id.* at 222-23. In the end, however, because it deemed the petitioner's forgone charges to be less serious, it did not decide the matter.

The Fourth Circuit has taken yet a different tack, narrowly reading *Bousley*'s stated rule to require actual innocence of only more serious charges forgone that were based on the same instance of criminal conduct. In *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016), the petitioner pleaded guilty to three counts: Hobbs Act robbery, a § 924(c) count based on that robbery, and a felon-in-possession count under 18

U.S.C. § 922(g). *Id.* at 180. In exchange for his guilty plea, the government dismissed five counts relating to other armed robberies, including two other § 924(c) counts based on two of those other robberies. *Id.*; *see* Gov't Br. at 4, *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016) (No. 13-7107). Adams later sought to pursue a § 2255 challenge to the § 922(g) felon-in-possession count through the gateway of the actual innocence exception, and the question arose whether he had to also show actual innocence of the five dismissed charges.

The Fourth Circuit held that was not required to show actual innocence beyond the challenged § 922(g) conviction because none of the dismissed charges were "more serious" in relation to one instance of criminal conduct underlying the challenged count. *Id.* at 180, 184-85. The court reached this conclusion by focusing on this Court's case-specific discussion of what Bousley would need to show. *Adams,* 814 F.3d at 184. According to the Fourth Circuit, "[a]ll of the Supreme Court's analysis related to what Bousley had to show to prove actual innocence of [the challenged] § 924(c) crime of conviction." *Id*. "In other words, the Court focused on *one instance* of criminal conduct: whether Bousley violated § 924(c) by using, carrying, or possessing a firearm" in relation to a drug trafficking offense. *Id.* (emphasis added).

The Fourth Circuit therefore held that "a defendant making a claim of actual innocence after a negotiated guilty plea must show that he is factually innocent of the underlying criminal conduct" related to the challenged count, but not that "he is actually innocent of other, dissimilar charged conduct." *Id.* at 184. Echoing Justice Scalia, the court gave the example of a person charged with second degree murder

but who pleaded guilty to voluntary manslaughter. That person would have to show his actual innocence of both voluntary manslaughter and second-degree murder. *Id.* For Adams himself, the Fourth Circuit's understanding of *Bousley* meant that he did not need to show actual innocence of the five dismissed counts relating to "other armed robberies," which included two other § 924(c) counts. *Id.* at 180, 184-85. Given the existing 20-year sentence for the remaining counts (already greater than the statutory maximum for the invalid § 922(g) count), the Court vacated the invalid § 922(g) conviction and its attendant sentence without remand. *Id.* at 185.

The Sixth Circuit has now joined the Seventh Circuit, holding that under *Bousley*'s reasoning, a petitioner must show actual innocence of both more serious charges and equally serious charges dismissed by the government in the course of plea bargaining. The Sixth Circuit denied the relevance of the case-specific equities at play with respect to Mr. Witham's plea bargaining and sentence, including that the government knew the § 924(c) it selected was the subject of ongoing litigation while obtaining a massive benefit from Mr. Witham's extraordinary cooperation, and also that Mr. Witham received a more severe sentence for the non-924(c) counts than he would have directly due to the conduct underlying the three dismissed 924(c) counts. According to the Sixth Circuit, the functional reality that Mr. Witham was punished more severely for the conduct underlying the dismissed charges plays no part in the application of *Bousley*'s rule or rationale. Pet. App. 14a.

In addition to the clear circuit split, confusion and disarray reign in circuits that have not addressed the question. For example, in *United States v. Godfrey*, a

judge in the Southern District of New York concluded that a § 2255 petitioner seeking to challenge the single § 924(c) count to which he pleaded guilty as part of a plea agreement, and of which he was actually innocent, need not also show actual innocence of a forgone equally serious racketeering conspiracy count or a foregone equally serious § 924(c) count predicated on different substantive conduct. 616 F. Supp. 3d 267, 277-78 (S.D.N.Y. 2022). The court came to this conclusion despite the Second Circuit having issued two summary orders—*Kinley v. Artus*, 571 F. App'x 30, 31 (2d Cir. 2014) (summary order) and *Lyons v. LaClaire*, 571 F. App'x 34, 35 (2d Cir. 2014) (summary order)—that broadened *Bousley*'s rule to mean that actual innocence must extend to equally serious charges." Another judge in that circuit has said the differing conclusions leave the matter "not clear." *Middlebrooks v. United States*, No. 6:18-cr-06049 EAW, 2024 WL 3552551, at *1 (W.D.N.Y. July 26, 2024).

The deep disagreement between the circuits and lack of clarity elsewhere is unlikely to resolve itself. This conflict will remain until this Court resolves it. Until then, the liberty of incarcerated persons will continue to depend solely on the luck of geography. There is no dispute that Mr. Witham's seven-year sentence for his § 924(c) conviction violates due process. If his actual innocence of that conviction is sufficient to excuse his default, then his continued incarceration without the opportunity to seek redress works a grave injustice.

II. The Sixth Circuit is wrong.

The Sixth Circuit is wrong to extend *Bousley*'s stated hurdle beyond its express terms to apply to equally serious charges. The Sixth Circuit assumed that allowing a

§ 2255 petitioner to proceed without also showing actual innocence of all equally serious dismissed charges would unfairly result in a § 2255 petitioner "escaping punishment for dismissed counts that he actually committed." Pet. App. 9a (internal quotation marks omitted). But this categorical assumption is mistaken, as it denies access to habeas review to a large many who do not in fact escape such punishment. The lower court overlooked the functional realities of federal sentencing in cases involving multiple counts of conviction, and in general. As shown by this case and the Fourth Circuit's decision in *Adams*, a strict application of the actual innocence exception as stated in *Bousley*—extending only to "more serious charges" arising from same instance of criminal conduct as the invalid count—will not necessarily mean the petitioner escapes punishment for conduct of which his is factually guilty, like the wheel-man in Justice Scalia's absurd example. It means only he will be relieved of unjust incarceration *for the invalid conviction* itself.

When valid counts remain, many petitioners will still be subject to punishment for conduct underlying equally serious dismissed counts, and even for conduct underlying the invalid count itself, most usually accomplished by way of the sentencing package doctrine and an increased offense level pursuant to the Guidelines' "relevant conduct" rule designed to account for uncharged and dismissed conduct. *See* U.S.S.G. § 1B1.3. That is what happened in *Lewis v. Peterson*, where the petitioner originally agreed with the government that the conduct underlying the dismissed counts would be used to increase his guideline range as relevant conduct. *See* Report and Recommendation at 2, *Lewis v. Morrison*, No. 0:06-cv-03455 (D. Minn.

Sept. 13, 2007). Or, as in *Godfrey*, the government might successfully move to reinstate a dismissed count under 18 U.S.C. § 3296 and start the plea bargaining process over, with the resulting new sentence similarly imposed in light of the parties' agreement.[4] Even if no valid counts remain and the government is unable to reinstate a dismissed charge, perhaps due to the terms of the plea agreement, *see, e.g.*, *United States v. Sandoval-Lopez*, 122 F.3d 797 (9th Cir. 1997); *United States v. Petties*, 42 F.4th 388 (4th Cir. 2022), it is a near certainty that the petitioner has served some time in prison, likely many years. It is simply untrue to say that these petitioners were allowed to "get off scot-free" for their actual, factual conduct.

Mr. Witham's case is a vivid illustration of the Sixth Circuit's error. As recounted, he was originally subject to a six-level increase in the offense level in Groups One and Two for use of a firearm during the bank extortion and carjackings. By increasing the offense level from 32 to 38 in Group Two, the guideline gun enhancement drove the career offender calculation and thereby increased the guideline range for the non-924(c) offenses. If the § 924(c) conviction and sentence for Count Thirteen is vacated, the offense level for the Group Three attempted bank extortion and carjacking offenses would likewise be increased by six levels. *See Dean v. United States*, 581 U.S. 62, 68-69 (2017) (describing the "sentencing package"

[4] Section 3296(a), enacted after *Bousley* was decided, permits the government to move to reinstate dismissed counts without regard to the statute of limitations in certain prescribed circumstances. *United States v. Godfrey*, No. 17-cr-511 (SHS), 2022 WL 4244245, at *1 (S.D.N.Y. Aug. 4, 2022). The petitioner in *Godfrey* ultimately pleaded guilty to one of the reinstated counts and was sentenced to time served, with the other § 924(c) count once again dismissed. *See* Judgment, *United States v. Godfrey*, No. 1:17-cr-00511-SHS (S.D. Ohio Mar. 13, 2023) (Doc. 466).

doctrine); *United States v. Pembrook*, 79 F.4th 720, 724 (6th Cir. 2023) (explaining that defendants' Guidelines range increased from their original sentencing "because the new PSRs added a five-level enhancement for brandishing a firearm, which applied only after the second § 924(c) charge was excluded").

True, a petitioner's final guideline range in a multi-count case could end up lower if no valid § 924(c) conviction remains. But this is not an unfair or absurd "windfall" to him. In that case, the range would be lower because the U.S. Sentencing Commission deems that lower range sufficient to account for all the remaining valid counts of conviction, including increases for the use of the firearm for each group of substantive offenses. As in *Adams*, a guideline range that does not change once the invalid conviction is vacated suggests that the punishment for the remaining counts is sufficient to reflect their total severity and harm. If the district court nonetheless elects to engage in a full resentencing process, as it is authorized to do, *see Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997) ("[Section] 2255 gives the [district] court jurisdiction and authority to reevaluate the entire aggregate sentence to ensure that the defendant receives the appropriate sentence on the remaining count."), the parties would be free to renegotiate a different starting point—but now in a different, constitutional landscape.

In short, the Sixth Circuit's categorical assumptions about relative unfairness and equities are not born out by reality or necessity. The Fourth Circuit got it right. The added hurdle in *Bousley* should be strictly read and narrowly applied, extending no further than its explicit terms and, as suggested by the case-specific circumstances

there, limited to more serious offenses the government elected not to charge arising from the same instance of offense conduct underlying the claimed invalid count. It should not apply to any dismissed § 924(c) count predicated on differing underlying offense conduct.

III. This case is an excellent vehicle for addressing this important question.

This case perfectly illustrates how a rule requiring a § 2255 petitioner to show actual innocence of equally serious dismissed charges upends the balance of equities embodied by the actual innocence exception: It wrongly forces a person to serve time in prison for conduct that is not a crime and is unnecessary to avoid unfair windfalls. If the Court were to clarify *Bousley*'s added hurdle as requiring a showing of actual innocence only of "more serious" charges arising from the same instance of criminal conduct, Mr. Witham would be allowed to pursue his *Davis* claim. He would have to show actual innocence only of the challenged § 924(c) offense (Count 13) predicated on the attempted armed bank extortion committed on October 21, 2015 (Count 11). Once he does and that § 924(c) is vacated, as it indisputably must be in light of *Davis*, he must be relieved of the punishment for it.

No additional showing is needed if the concern of *Bousley*'s added hurdle is absurd windfalls, as Justice Scalia surmised. Mr. Witham would not "escape punishment" for the equally serious dismissed § 924(c) offenses of which he may be factually guilty. Again, his current sentence for all the non-924(c) counts already includes added punishment for the dismissed § 924(c) counts. If Mr. Witham obtains relief from the unjust incarceration for the non-existent § 924(c) crime alleged in

Count Thirteen, his offense level for the Group Three carjacking offense will be increased by six levels for the use of a firearm, resulting in a corrected guideline range deemed sufficient by the Sentencing Commission.

Nor would vacating the invalid § 924(c) count necessarily result in a sentence 84 months shorter, or shorter at all. The government would be free to seek a full resentencing and argue for the sentence it believes accounts for all his offense conduct as well as his extraordinary cooperation—but now in a constitutionally shrunken bargaining field. Whereas before, Mr. Witham faced six § 924(c) counts and pleaded to one in exchange for dismissal of the other five, now there remain only three valid dismissed § 924(c) counts. Even if he again pleads guilty to just one of the three, just two would remain, a change in dynamics that could fairly support revisiting the parties' agreed starting point for the cooperation departure or the calculus for assessing how much to cut that departure due to the dismissed counts. But no matter the sentence ultimately imposed, it *will* reflect a corrected guideline range that includes increases for the use of a firearm as relevant conduct but *will not* include any term of incarceration for the invalid § 924(c) offense. Permitting Mr. Witham to vindicate his and society's overriding interest in being free of unjust incarceration would cost little in terms of judicial resources and not result in any windfall to him.

As it stands now, however, he must continue to serve an illegal sentence for an indisputably invalid § 924(c) simply because he was sentenced in the Sixth Circuit, while untold numbers of offenders obtain relief from unjust incarceration

for invalid convictions in the Fourth Circuit and elsewhere. Unless this Court grants certiorari to resolve the issue, the fundamental liberty interests of federal prisoners sentenced for conduct that turns out not to be a crime at all will continue to depend on the luck of geography.

This case also squarely presents the issue. The Sixth Circuit granted the certificate of appealability in this § 2255 proceeding and affirmed in a precedential decision after full briefing and submission for decision after consolidated oral argument by Mr. Witham and another petitioner raising the same issue. Should this Court hold that a § 2255 petitioner in Mr. Witham's shoes need only show that he is actually innocent of more serious charges forgone by the government, whether tied to the same underlying offense conduct or not, Mr. Witham would prevail on the merits of his claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

JENNIFER NILES COFFIN
Assistant Federal Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979
Counsel for Brian Scott Witham

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