No. 24-5494

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The government does not deny either the existence of a circuit conflict or the exceptional importance of the question presented. In fact, the question is so important that the government opted not to raise a waiver argument in the lower court, removing that obstacle from further review. The government also implicitly recognizes that Mr. Witham himself would enjoy no windfall should the unconstitutional § 924(c) conviction in Count Thirteen be vacated.

This case is a perfect vehicle for resolving the current three-way circuit conflict. And now is the time: Each of the Court's previous denials of review of this issue occurred before the Fourth Circuit forged its unique approach and the Sixth Circuit deepened and widened the intractable conflict. The Court should grant the petition and reverse.

I. The circuit conflict is clear, reasoned, and firmly entrenched.

The circuits have interpreted the Court's decision in *Bousley* in directly conflicting ways. The Fifth and Eighth Circuits apply a "greater-only" rule, barring actual-innocence claims only when any forgone charge is more serious than the charge for which the petitioner claims actual innocence to avoid procedural default. The Fourth Circuit applies a "fact-specific, greater-only" rule, analyzing and comparing each instance of criminal conduct. And the Seventh Circuit, now joined by the Sixth, applies a "greater-or-equal" rule that bars exception to procedural default where the forgone charges are more serious or equal to the instant ones. The answer to whether a petitioner must show actual innocence of equally serious charges is "no"

in three circuits (with two variations) and "yes" in two others.[1]

That conflict is widely recognized. As the government notes, the Seventh Circuit acknowledged it over two decades ago in *Lewis v. Peterson*, 329 F.3d 934 (7th Cir. 2003). The D.C. Circuit has likewise stated that the circuits "appear[ed] divided with respect" to the issue. *United States v. Caso*, 723 F.3d 215, 222 & n.3 (D.C. Cir. 2013). And the conflict has grown even more entrenched over the last decade, with two new circuits weighing in with differing approaches. Only this Court can resolve this longstanding, acknowledged conflict.

The government does not deny the existence of the conflict. It instead contends only that review is unwarranted because "[a]ny disagreement is unclear, unreasoned, and limited." BIO at 12. To get there, however, the government glosses over the logical import of the Eighth Circuit's holding in *United States v. Johnson*, 260 F.3d 919 (8th Cir. 2001), and also the government's own opposite reading of *Bousley* in that case; minimizes the Fifth Circuit's holding in *United States v. Scruggs*, 714 F.3d 258 (5th Cir. 2013); and misdescribes the Fourth Circuit's extensively reasoned decision in *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016).

1. In *Johnson*, the Eighth Circuit analyzed whether the second § 924(c) charge was "more serious" than the other—necessarily following a rule where the other charges had to be more serious, not equally serious, to preclude relief. *Johnson*

[1] The answer now also appears to be "no" in the Ninth Circuit. *See United States v. Ovsepian*, 113 F.4th 1193, 1204 n.4 (9th Cir. 2024) ("[A] petitioner must demonstrate actual innocence of more serious charges that were dismissed in exchange for a guilty plea on lesser offenses.").

did not leave open the question whether *Bousley*'s rule applies to equally serious charges, as the government suggests (BIO at 13-14), because the court had already made clear that *Bousley*'s added actual-innocence showing applies only to more serious charges in an earlier published decision in the same case. *See Johnson v. United States*, 186 F.3d 876 (8th Cir. 1999).

In the earlier appeal, the Eighth Circuit quoted *Bousley*'s "more serious" rule as the governing rule. *Id.* at 878. But it declined to decide whether the second, dismissed § 924(c) charge was, in fact, "a 'more serious' charge within the meaning of *Bousley*." *Id.* Instead, it remanded the case for the district court to decide the question in the first instance. *Id.* The Eighth Circuit concluded: "If the district court concludes the dismissed § 924(c) count is a more serious charge, then *Johnson* must show he is actually innocent of the charge as well." *Id.* The court in that appeal obviously understood *Bousley* to require a showing of actual innocence only of a "more serious" charge. It otherwise had no reason to remand the case to see if the second § 924(c) charge was in fact more serious.

In its later decision, the Eighth Circuit doubled down on that rule in its discussion of the government's remaining challenge: "whether the dismissed § 924(c) charge [was] more serious than the § 924(c) charge to which Johnson pleaded guilty." *Johnson*, 260 F.3d at 921; Gov't Br. at 9, 15-16, *Johnson*, No. 01-1846, 2001 WL 35994393 (May 29, 2001). When the government brought that second appeal, after the district court had found on remand that the dismissed § 924(c) was not "more serious," the government's primary issue was "what constitutes a more serious charge

within the meaning of *Bousley*." Gov't Br. at 14, *Johnson*, No. 01-1846, 2001 WL 35994393 (May 29, 2001).

At the same time, the government's briefing in the second *Johnson* appeal indicates that it was somewhat confused by *Bousley*. The government pointed out that the "use" and "carrying" prongs of § 924(c) are merely alternative theories of guilt for the same offense. *Id.* at 9. In trying to make sense of the Court's "more serious" requirement, the government argued that "it appears . . . that the *Bousley* court meant a forgone *Bailey*-valid Section 924(c) count to be deemed 'more serious' than a *Bailey*-invalid Section 924(c) to which petitioner pleaded guilty." *Id.* at 16. In other words, the government in *Johnson* did not argue that *Bousley* requires a showing of actual innocence of equally serious charges, as it says here. BIO at 13. Instead, it made exactly the opposite argument: Because *Bousley* requires a showing of actual innocence only for more serious counts foregone, *Bousley* must have meant that a second, a dismissed § 924(c) count is always more serious.

Notably, in the very next sentence of its *Johnson* brief, the government admitted that "[i]t is obvious that mathematics is not supportive of this reading." *Id.* at 16. Yet it went with that reading anyway, arguing that the dismissed § 924(c) there was "more serious" under *Bousley*'s language because a second § 924(c) generally carries an enhanced penalty. *Id.* at 14-17. And in addressing the government's argument, the Eighth Circuit accepted the premise that "one § 924(c) charge can be more serious than another § 924(c)." *Johnson*, 260 F.3d at 921. Even so, the court held, the dismissed charge in Johnson's case could not have received enhanced punishment

due to circumstances particular to his case, so was not more serious under *Bousley*. *Id.*

The Eighth Circuit's analysis of *Johnson* across its two opinions thus depended on its understanding that *Bousley* meant for the actual-innocence requirement to apply only to more serious charges. As in the earlier appeal, had the court in the second appeal understood *Bousley*'s requirement to extend to equally serious charges, it would have certainly required Johnson to make that showing, as a second § 924(c) count that is not more serious than the first § 924(c) count is necessarily equally serious. Because it did not, the court (once again) rejected any reading of *Bousley* to require a showing of actual innocence of an equally serious charge.

2. The government's effort to downplay the Fifth Circuit's decision in *United States v. Scruggs*, 714 F.3d 258 (5th Cir. 2013), suffers from the same illogic. There, the petitioner explicitly argued that the three dismissed honest-services counts were equally serious as the invalid honest-services count to which he pled guilty, so did not meet *Bousley*'s "more serious" language. *Id.* at 265-66. The Fifth Circuit disagreed, holding that the three dismissed honest-services counts were in fact more serious because the judge could have imposed consecutive sentences for them. *Id.* at 266. If the Fifth Circuit understood *Bousley* to extend to equally serious charges, it would not have bothered with that analysis.

3. The Fourth Circuit's decision in *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016), also clearly addressed the question presented here—not merely an "ancillary issue," BIO at 14—when it adopted a conduct-based approach no other

court has adopted. Pet. at 21-23. Adams argued he was actually innocent of his conviction under 18 U.S.C. § 922(g), which carried a statutory range of zero to ten years. The government argued that *Bousley*'s "more serious charges" required him also to show actual innocence of three dismissed Hobbs Act robbery charges (statutory ranges of zero to twenty years) and two § 924(c) charges (statutory ranges of five years to life) because, it said, those charges were in fact "more serious." Gov't Br. at 13-16, 21, *Adams*, No. 13-7107, 2015 WL 5475272.

In rejecting the government's argument, the Fourth Circuit did not adopt a rule that applies to both equally serious and more serious charges, as the government seems to suggest. BIO at 14. Rather, it explicitly acknowledged it was governed by *Bousley*'s "more serious" language. *Id.* at 183. It cited its decision in *Lyons v. Lee*, 316 F.3d 528 (4th Cir. 2003), which likewise applied the "more serious" language. *Id.* at 533 n.5. And it was in addressing whether the dismissed charges in Adams' case were in fact "more serious" that it adopted its conduct-based approach. The court in no way dispensed there with the "more serious" requirement, nor has it since. *See United States v. McKinney*, 60 F.4th 188, 197 (4th Cir. 2023) (referring again to "more serious, dismissed charges").

Nor would the Fourth Circuit treat the three dismissed § 924(c) counts based on carjacking in Mr. Witham's case as "more serious" charges under its conduct-based analysis. *Contra* BIO at 14. Here, because the government now agrees that the dismissed § 924(c) counts are equally serious, the question whether they are more serious compared to the "instance of criminal conduct" underlying the invalid count

would not come up in the Fourth Circuit.

In short, an established conflict has produced at least three rules from at least five circuits. The courts of appeals recognize that they "appear divided with respect" to the issue. *Caso*, 723 F.3d at 222 & n.3 (D.C. Cir. 2013). And with that longstanding and entrenched conflict showing no signs of resolving, individuals suffer different fates based solely on geography. That arbitrariness should not be tolerated. Review is necessary.

II. The government cleared the path for review of this issue by waiving enforcement of the § 2255 waiver.

The government contends that this case is a "poor candidate" for addressing the question presented because Mr. Witham waived his right to file a § 2255 motion as part of his plea agreement. BIO at 14-15. As a result, the government says, his "motion would fail irrespective of *Bousley*." Not so.

The government itself paved the way for review in this Court by deliberately not raising any waiver argument in the court of appeals in favor of resolution on the merits of the question of procedural default. The government raised the § 2255 waiver issue only in the district court, where Mr. Witham vigorously challenged its enforcement on the ground that a § 2255 waiver is not enforceable against a claim of actual innocence, citing numerous authorities. Reply to Gov't Resp. to § 2255 Motion at 1-3, No. 3:20-cv-0277 (E.D. Tenn. Nov. 30, 2020) (Doc. 9). The government did not raise the § 2255 waiver again on appeal, although it had raised that argument in other similar cases. *See*, *e.g.*, *Portis v. United States*, 33 F.4th 331, 338 (6th Cir. 2022).

Those actions were a deliberate waiver of the government's known right, not

mere "inadvertent error" that constitutes forfeiture. *Wood v. Milyard*, 566 U.S. 463, 473-75 (2012). The government omitted an argument in the court of appeals based on facts it was certainly aware of—the waivers in the plea agreement—and upon which it had successfully relied to obtain dismissal of the direct appeal[2] and to which it referred in its recitation of the procedural history in this appeal. Gov't Br. at 9. Indeed, when directly questioned at argument about whether it was raising a waiver argument, the government agreed with the court that "[w]e're not invoking any appellate wavers, collateral attack waivers" and expressly recognized that "[t]he only defense we're raising is the procedural default objection or defense." *See* Oral Argument at 23:31-23:47, *Witham* v. *United States*, No. 21-6214 (6th Cir. Mar. 20, 2024).

Rather than raise the § 2255 waiver as a ground for dismissal in this appeal, the government chose to file a brief arguing the merits of the *Bousley* procedural-default issue. It thereby ensured that the Sixth Circuit would decide a question that had been the subject of debate among the circuits, while also ensuring that the court would *not* address the question whether the particular language of the § 2255 waiver in this case is enforceable against Mr. Witham's claim of actual innocence—a matter of ongoing debate in the court below, *see Portis*, 33 F.4th at 334 (leaving the question open), but decided in Mr. Witham's favor in several circuits.[3]

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[2] *See* Order Dismissing Appeal, Nos. 17-6010/6015/6017/6018/6019 (6th Cir. June 25, 2018).

[3] *See, e.g.*, *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001); *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007); *McKinney*, 60 F.4th at 193; *United States*

Even if the government had not deliberately waived enforcement of the § 2255 waiver in the court below, it is thus far from clear it would have been enforced had it been raised, and it would certainly not have been enforced in several other circuits under the "miscarriage-of-justice" exception. In these circumstances, any alleged waiver is no obstacle to further review.

III. The Sixth Circuit's assumptions are wrong about the relative equities behind *Bousley*'s rule.

On the merits, the government seems to ignore that the purpose of *Bousley*'s extra hurdle is to avoid absurd windfalls, as illustrated by Justice Scalia's example of the wheel-man who pleads guilty to voluntary manslaughter to avoid prosecution for the more serious crime of felony murder. Pet. at 19. And as Mr. Witham's own sentence shows, that rationale will not be furthered by requiring petitioners to show actual innocence of equally serious counts.

To simplify somewhat, Mr. Witham's sentence was increased in three ways to account for the dismissed firearm use and other dismissed counts: (1) through an increased guideline range, *see* Pet. at 11-12; (2) through an increased starting point within that range, *see* Pet. at 10-11, 26-27; and (3) through a limited departure for cooperation, *see* Pet. at 12. Given those adjustments, vacating Count 13 would not lead to a windfall for Mr. Witham, because his sentence already accounts for the

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v. Andis, 333 F.3d 886, 889-90 (8th Cir. 2003) (en banc); *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011); *United States v. Hahn*, 359 F.3d 1315, 1325, 1327 (10th Cir. 2004) (en banc) (per curiam); *United States v. Guillen*, 561 F.3d 527, 531-32 (D.C. Cir. 2009). *But see Rudolph v. United States*, 92 F.4th 1038, 1048-49 (11th Cir. 2024).

dismissed § 924(c) counts. Instead, it would result in only a constitutional sentence imposed in a properly recalibrated landscape where the government could seek added punishment for the dismissed § 924(c) counts. If Mr. Witham were to be resentenced, the guideline minimum would remain at 360 months; the agreed-upon additional 60 months would presumably remain untouched; and the sentencing court would be free to reassess its overall sentence under 18 U.S.C. § 3553(a) to account for Mr. Witham's cooperation. As before, the court might exercise its discretion under §3553(a) to cut short the extent of the departure for cooperation, erasing any remaining fear of a windfall. Tellingly, the government makes no attempt to suggest that Mr. Witham would enjoy a windfall or that its interest in punishment for the conduct underlying the invalid § 924(c) count would go unanswered.

Nor is Mr. Witham's sentencing posture unusual. Guideline ranges commonly include increases for dismissed and uncharged separate crimes under the Guidelines' cornerstone "relevant conduct" rule. *See* U.S.S.G. § 1B1.3(a)(2) & cmt. (n.3). That the federal sentencing guidelines may later be amended (BIO at 11) does not undermine the need to account for their functional effect in a given case no matter the meaning of *Bousley*'s rule. And contrary to the government's suggestion (BIO at 11), similar functional realities are at work in state habeas cases applying *Bousley*. *See, e.g.*, *Moon v. Coursey*, 599 F. App'x 697, 697-98 (9th Cir. 2015).

As for hypothetical cases in which a "defaulted claim challenges all counts of conviction" (BIO at 11), the uncertainty of potential prosecution for dismissed counts after a long lapse of time does not counsel in favor of a rule that allows the

government to force every person with a defaulted claim to carry the burden of proving he is innocent of charges the government did not pursue. Not only has the person served that long lapse of time in prison, but charges are dismissed for a variety of reasons, including that the government's evidence was weaker than the offense to which the person pled guilty. Contrary to the Seventh Circuit's assumption in *Lewis v. Peterson*, 329 F.3d 934, 936 (7th Cir. 2003), it is unfair to assume in every case that the government could have secured a conviction. *Contra* BIO at 9-10.

In short, if there must be some additional hurdle for showing actual innocence in guilty plea cases (which Mr. Witham does not challenge here), *Bousley*'s "more serious" language is more likely to account for sentencing realities *and* respect a person's constitutional rights. The solution is not to force every person serving an unconstitutional sentence to suffer the whole of it, no matter what.

CONCLUSION

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

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