No. 24-_____

IN THE
Supreme Court of the United States

ERIC ROBERT RUDOLPH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Nearly all federal criminal cases end in a guilty plea. In many of those pleas, the defendant signs an agreement promising not to file a future 28 U.S.C. § 2255 motion. But let's say the law later changes through a new substantive rule of constitutional law, like the rule in *United States v. Davis*, 588 U.S. 455 (2019), where the Court held that the residual clause in 18 U.S.C. § 924(c) is unconstitutional. In this setting, a defendant suddenly stands convicted and sentenced for an act that is no longer a crime. His conduct does not violate the elements of the crime — he is factually innocent. When a petitioner files a § 2255 motion, then, what shall a court make of the collateral-attack waiver?

This Court has crafted actual innocence "gateways" to excuse procedural default, *Schlup v. Delo*, 513 U.S. 298, 314-15, 327-28 (1995), and to excuse a failure to comply with AEDPA's one-year statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). In this case, we ask the Court to bless a third gateway, one that allows an innocent habeas petitioner to bypass a plea agreement's collateral-attack waiver.

When a § 2255 petitioner demonstrates through a retroactive constitutional rule that he is innocent, must an otherwise valid collateral-attack waiver foreclose habeas relief — despite that innocence?

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Petitioner Eric Robert Rudolph petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION & ORDERS BELOW

The published opinion of the Eleventh Circuit affirming the district court's denial of the 28 U.S.C. § 2255 motion, *Rudolph v. United States*, 92 F.4th 1038 (11th Cir. 2024), is included in the appendix below. Pet. App. 1. So, too, is the appeals court's order denying a petition for rehearing en banc. Pet App. 10. The district courts' orders denying Rudolph's § 2255 motions are also included. Pet. App. 13, 73.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of civil cases in the courts of appeals. The Eleventh Circuit affirmed the district court's order denying Rudolph's § 2255 motion on February 12, 2024. The court then denied a petition for rehearing en banc on May 10, 2024. Justice Thomas granted an application to extend the deadline by 30 days, or until September 7, 2024. S*ee* 28 U.S.C. § 2101 and Supreme Court Rules 13.5 and 30.2. However, that new deadline landed on a Saturday, so we have filed the petition on the next business day: September 9, 2024. *See* Supreme Court Rule 30.1 Therefore, we have filed this petition on time.

STATUTORY PROVISIONS INVOLVED

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

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

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

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

18 U.S.C. § 844(i) provides in full:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

INTRODUCTION

Half a century ago, Judge Henry J. Friendly asked the same question we ask here: "Is innocence irrelevant?" Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). And like Judge Friendly, we believe the answer is "No." Strong headwinds—finality, preservation of judicial resources, and deterrence—face any criminal defendant hoping to convince a court to vacate his conviction. *Id.* at 146-48 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963)). Our position here is consistent with these long-standing habeas principles. Judge Friendly himself declared that "I would . . . allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man." *Id.* at 160.

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

Three decades ago, this Court crafted an actual-innocence exception to excuse procedural default. *Schlup*, 513 U.S. at 314-15, 327-28 (forgiving procedural default

upon a showing that "it is more likely than not that no reasonable juror would have convicted" the defendant of the offense to which he pleaded guilty); *see also House v. Bell*, 547 U.S. 518, 555 (2006). And more than a decade ago, the Court endorsed the actual-innocence exception to excuse an untimely petition filed beyond the AEDPA's statute of limitations. *McQuiggin*, 569 U.S. at 392. Here we ask the Court to extend these principles to a third procedural hurdle: the collateral-attack waiver.

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

First, the question here is the source of a deep conflict in the circuit courts. Four circuits—the Sixth, Seventh, Ninth, and Eleventh Circuits—have enforced collateral-attack waivers against otherwise-winning innocence claims, like *Davis*, where the Court held that the residual clause in 18 U.S.C. § 924(c) is void for vagueness. On the other side of the divide, four circuits—the Third, Fourth, Eighth, and D.C. Circuits—have done exactly what we propose here and held that a collateral-attack waiver must give way to a winning constitutional claim when that claim means the defendant is actually innocent of the § 924(c) crime. For example, in *United States v. McKinney*, the Fourth Circuit did what we ask the Court to do here; it held that "[u]nder *Davis*, . . . McKinney . . . has made a cognizable claim of actual innocence [on the § 924(c) count] and so . . . has satisfied the miscarriage-of-justice requirement. Accordingly, McKinney's appeal waiver does not bar his claim for relief." 60 F.4th 188, 192-93 (4th Cir. 2023). This entrenched split means that without this Court's intervention an innocent petitioner's freedom from imprisonment depends only upon the fluke of geography.

Second, this question is one of national importance that arises frequently in the lower courts. Defendants all over the country have pursued § 2255 relief in the wake of *Davis*. The stakes for each such case are high: the § 924(c) conviction leads to a substantial increase in a defendant's term of imprisonment (a minimum consecutive term of five, seven, or ten years in prison, up to a maximum of life in prison). It is important that a statute, especially this hyper-punitive statute, apply uniformly throughout the country. Eight circuits have resolved this waiver question, so it recurs in every corner of the country. Plus, for the majority of federal defendants whose cases resolve through a plea, the Eleventh Circuit's rule effectively negates the retroactive application of new substantive rules like *Davis*.

Third, this case is a strong vehicle for the Court to answer the question presented. The facts are undisputed, the merits of the *Davis* claim are undisputed, and the Eleventh Circuit resolved Rudolph's appeal only by enforcing the collateral-attack waiver.

Finally, the Eleventh Circuit erred in failing to apply an actual-innocence exception to the waiver. This Court has not yet determined whether actual innocence may serve as an exception to a collateral-attack waiver. But if the actual-innocence gateway is an appropriate exemption to both procedural default (a doctrine crafted by this Court) and the statute of limitations (a jurisdictional bar penned by Congress), that gateway must bypass any collateral-attack waiver adopted by the parties in a plea agreement.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A quarter century ago, Eric Robert Rudolph detonated bombs at Centennial Olympic Park, a women's health clinic, and a nightclub in Atlanta, Georgia, and a women's health clinic in Birmingham, Alabama. Through these acts he killed two people and injured many others. Following his arrest five years later, Rudolph pled guilty in the Northern District of Alabama to interstate arson resulting in death and personal injury, a violation of 18 U.S.C. § 844(i), and use of a destructive device during and in relation to the crime of violence charged in count one, a violation of 18 U.S.C. § 924(c)(1). *Rudolph*, 92 F.4th at 1041-42. Through the written plea agreement, Rudolph waived "the right to appeal his conviction and sentence in this case, and the right to collaterally attack his sentence in any post-conviction proceeding, including motions brought under 28 U.S.C. § 2255 . . . on any ground." *Id.* The district court in the Northern District of Alabama imposed a life sentence on each count, to run consecutively. *Id.*

Rudolph then pled guilty in the Northern District of Georgia to five counts of arson in violation of § 844(i) and three counts of using and carrying a destructive device during a crime of violence in violation of § 924(c)(1). Rudolph agreed to an appeal and collateral-attack waiver identical to the waiver in the Alabama case. The district court in Georgia sentenced Rudolph to serve four consecutive terms of life in prison—one each on an arson count and the three § 924(c) counts—plus consecutive terms totaling 120 years in prison on the remaining arson counts.

This Court later struck down the residual clause in § 924(c)(3)(B). *Davis*, 588 U.S. at 470. Rudolph filed 28 U.S.C. § 2255 motions in both district courts. He argued that his four § 924(c) convictions were unlawful because the § 844(i) violations were categorically no longer crimes of violence and could no longer prop up the § 924(c) convictions. The merits argument relied on two pillars. First, the arson statute criminalizes acts against one's *own property*, yet a § 924(c) violation is limited to crimes against *the property of another*. Second, the crime defined in § 844(i) includes the mental state of recklessness. Each of these independent grounds demonstrated that the crimes of violence here were based not upon § 924(c)'s elements clause, but solely upon the now-forbidden residual clause. *See Torres v. Lynch*, 578 U.S. 452, 466 & n.10 (2016) (embracing Solicitor General's concession that elements clause of 18 U.S.C. § 16(a), which is identical to § 924(c)(3)(A), "would not reach arson in the many States defining that crime to include the destruction of one's own property"); *United States v. Salas*, 889 F.3d 681, 684 (10th Cir. 2018) ("Both parties agree that . . . the 'elements clause[]' does not apply here because § 844(i) arson does not require, as an element, the use of force against the property 'of another'; for example, § 844(i) may apply to a person who destroys his or her own property.").

The government conceded below that a § 844(i) conviction is not, after *Davis*, a crime of violence, but raised various non-merits defenses instead. The district court in Alabama denied its motion based only upon the collateral-attack waiver. The district court in Georgia denied its § 2255 motion based upon both the collateral-attack waiver and procedural default. The two courts granted Rudolph certificates of appealability.

In a published opinion, a panel of the Eleventh Circuit resolved the case solely on the collateral-attack question. In doing so, the panel recast Rudolph's motion as a challenge not to his § 924(c) *convictions*, but only to his § 924(c) *sentences*: "The text of 28 U.S.C. § 2255, the history of that same statute, and the habeas corpus right that it codified, all point in the same direction: § 2255 is a vehicle for attacking sentences, not convictions." 92 F.4th at 1043. Once it held that a § 2255 can be targeted only at sentences, the panel drew a straight line to the waivers: "Rudolph's motions are collateral attacks on his *sentences*, so his plea agreements do not allow them." *Id.* at 1040 (emphasis added). Rudolph disagreed then, and now, with this view.

Yet he explained that whether § 2255 petitions can be used to challenge convictions or sentences is beside the point. He argued that even if the waiver applied to the *Davis* claim, it must not be enforced because he is actually innocent of the § 924(c) crimes. The panel demurred: "We decline to create this exception, or to apply it for Rudolph." *Id.* at 1049. The panel breezed past an entrenched circuit split on this topic (it relegated that split to a footnote) and ignored the actual-innocence exceptions—the habeas corpus "gateways"—that this Court carved through similar procedural hurdles in *Schlup* (procedural default) and *McQuiggin* (timeliness).

The panel was wrong to suggest the innocence exception would not apply here. Rudolph is actually—and factually—innocent of the § 924(c) crime. Where a factual predicate and element of the crime—the erstwhile § 844(i) crime of violence—evaporates, the conduct of a defendant does not violate the § 924(c) statute, and he is factually innocent.

See United States v. Bowen, 936 F.3d 1091, 1110 (10th Cir. 2019) ("Bowen's witness retaliation convictions do not qualify as crimes of violence under 18 U.S.C. § 924(c) . . . so Bowen is actually innocent . . . The parties agree that Bowen's actual innocence makes his § 2255 motion timely."); *Granda v. United States*, 990 F.3d 1272, 1292 (11th Cir 2022) ("Actual innocence means factual innocence, not mere legal innocence," but the absence within a § 924(c) count of a valid crime of violence is factual innocence.); *Crawford v. Cain*, 68 F.4th 273, 288-89 (5th Cir. 2023), *vacated and petition for rehearing granted on other grounds*, 72 F.4th 109 (2023) ("Factual innocence is an assertion by the defendant that he did not commit the *conduct* underlying his conviction . . . Crawford has not made a colorable claim of factual innocence . . . [because he] does not deny that he committed the elements of the offense.") Because the § 844(i) crime is not a crime of violence, this missing element means Rudolph did not commit the conduct criminalized by § 924(c) and is factually innocent of the four § 924(c) crimes.

One collateral question follows: The government dismissed other counts in exchange for the plea agreement, so Rudolph arguably must establish that he is actually innocent of any "more serious charges." *Bousley v. United States*, 523 U.S. 614, 624 (1998). But there are no such charges here. During plea negotiations, the government dismissed various crimes, including four counts under 18 U.S.C. § 844(d) for transporting an explosive in interstate commerce with intent to kill, injure, and intimidate individuals and to unlawfully damage property, and seven counts under 18 U.S.C. § 844(e). The government also promised not to file the statutorily required information that would have allowed it to pursue the death penalty on

one or more of the § 844(i) counts, but that was never a pending "charge," so it does not require *Bousley* analysis. Again, per *Bousley*, we must evaluate Rudolph's innocence only on "more serious charges," if any, and not on equally serious charges.[1] Because the dismissed counts here were merely equally serious, we need not prove Rudolph's innocence of those crimes.

Following the published panel opinion, Rudolph filed a petition for rehearing en banc, in which he urged the entire Eleventh Circuit to adopt and apply an actual-innocence (also known as "miscarriage of justice") exception to the generic collateral-attack waiver. The full court declined, and through this petition, we now ask this Court to intervene.

REASONS FOR GRANTING THE PETITION

Most federal criminal cases end in a guilty plea.[2] In many of those plea agreements, the defendant promises not to file a habeas petition for any reason. But what if the law later changes in a way that suddenly means he is innocent of the criminal charge? When a defendant files a 28 U.S.C.

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[1] As the *Rudolph* panel noted, there exists a circuit split on this question, too. 68 F.4th at 1049 n.4; *see also United States v. Johnson*, 260 F.3d 919, 921 (8th Cir. 2001) (concluding that in *Bousley*, the Court meant what it said when it wrote "more serious charges"); *but see United States v. Caso*, 723 F.3d 215, 222 (D.C. Cir. 2013) (opting in dicta for the extra-textual "equally serious" standard).

[2] *Table 4, U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2022*, U.S. Courts, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf (last visited September 5, 2024) (approximately 90 percent of federal indictments resolved through a guilty plea).

§ 2255 motion based upon a rule like *Davis*, he shows that he stands convicted of conduct that is no longer a crime.

The actual-innocence rule we propose here mirrors this Court's history in carving such gateways through similar habeas procedural hurdles. This Court ought to grant the petition to resolve the split in the circuits and map out an actual-innocence exception to collateral-attack waivers.

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

On this actual-innocence question, the circuits stand divided. The Third, Fourth, Eighth, and D.C. Circuits have applied the actual-innocence exception to collateral-attack or appeal waivers. On the other side of the debate, the Sixth, Seventh, Ninth, and now Eleventh Circuits have elected to exalt collateral-attack waivers above innocence, including winning *Davis* claims.

A. Four circuits have carved an actual innocence gateway through generic collateral-attack or appeal waivers.

Just last year, in *McKinney*, the Fourth Circuit offered the most recent, and robust, proclamation of the actual-innocence exception, and it did so in a case involving a *Davis* claim. 60 F.4th at 190. Like Rudolph, McKinney was convicted of a § 924(c) crime twinned with a crime (conspiracy in that case) that everyone agreed no longer qualified as a crime of violence. But because when McKinney pled guilty, he waived the right to challenge his conviction, the district court denied his § 2255 motion,

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

But long before *McKinney*, three other circuits exempted petitioners from waivers when they proved actual innocence. In *United States v. Khattak*, the Third Circuit held that "[w]aivers of appeals, if entered into knowingly and voluntarily, are valid, unless they work a miscarriage of justice," which includes the imprisonment of an innocent person. 273 F.3d 557, 563 (3d Cir. 2001).[3] In *United States v. Andis*, the Eighth Circuit held that "as the miscarriage of justice exception relates to [this] appeal, we reaffirm that in this Circuit a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver." 333 F.3d 886, 891-92 (8th Cir. 2003) (en banc). And in *United States v. Guillen,* the D.C. Circuit held that "a waiver [should not] be enforced if the sentencing court's failure in some material way to follow a

[3] "Actual innocence" and "miscarriage of justice" are synonymous phrases. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("In a trio of 1986 decisions, we elaborated on the miscarriage of justice, or 'actual innocence,' exception.").

prescribed sentencing procedure results in a miscarriage of justice." 561 F.3d 527, 531 (D.C. Cir. 2009).[4]

B. Four circuits have enforced a collateral-attack waiver against a winning *Davis* claim despite a defendant's actual innocence on his 18 U.S.C. § 924(c) crime.

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

In *Oliver v. United States*, the Seventh Circuit became the lone circuit to expressly hold that plea waivers must be enforced in the face of actual innocence, although it did so with hardly any explanation. 951 F.3d 841, 847 (7th Cir. 2020). Two other circuits have upheld waivers in the face of *Davis* claims, but expressly chose *not* to address the actual-innocence question, so they arguably ought not count on this side of the circuit-split scoreboard. *United States v. Goodall*, 21 F.4th 555, 565 n.6 (9th Cir. 2021); *Portis v. United States*, 33 F.4th 331, 339 (6th Cir. 2022). Of course, by turning a blind eye to the innocence gateway, the courts effectively held that no such exception exists. Yet even in this group of circuits, the consensus is fragile.

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[4] "The Tenth Circuit seemingly aligns with this actual-innocence cohort, too, although its rule is a bit more complicated. See *United States v. Hahn*, 359 F.3d 1315, 1329 (10th Cir. 2004) (en banc) ("We will enforce Mr. Hahn's appellate waiver unless we find that the enforcement of the waiver would constitute a miscarriage of justice," which the court equates to the fourth prong of the plain error test in *United States v. Olano*, 507 U.S. 725, 732 (1993)).

In *Portis*, a dissenting judge argued in favor of a miscarriage-of-justice exception to a *Davis* claim, just like the one we propose here. 33 F.4th at 341 n.2 (White, J., dissenting).

The Eleventh Circuit is the most recent circuit to elevate the waiver above all else, although it did not travel in a straight line. Two years ago, in *King v. United States*, the panel measured the issue, but opted to punt: "[W]e note that our Circuit has never adopted a general 'miscarriage of justice' exception to the rule that valid appeal waivers must be enforced according to their terms." 41 F.4th 1363, 1368 n.3 (11th Cir. 2022). Yet in a concurring opinion, one judge hinted that in another case he might formally recognize the existence of an actual-innocence gateway through an appeal waiver:

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

Id. at 1372 (Anderson, J., concurring). And now in Rudolph's case, the panel embraced the anti-innocence path: "We decline to create this exception, or to apply it for Rudolph." 92 F.4th at 1049.

In the end, there is sharp division among the circuits. Only this Court, of course, can resolve the simmering debate.

2. This question is of national importance.

The widening circuit split merits this Court's intervention. The question of who may gain *Davis* relief is one of high stakes. Any § 924(c) conviction is serious business. The crime induces a mandatory and consecutive increase in a term of imprisonment by five, seven, ten years, or even life. Meanwhile, the government charges the crime often, and this Court has grappled with its scope and meaning in more than a dozen opinions to date. It should add one more to the ledger.

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

Section 924(c)-related questions recur in every district and circuit all over the nation. During the year this Court issued the *Davis* opinion, the federal government convicted 3,142 people of at least one § 924(c) violation.[5] The § 924(c) prosecutions are distributed all over the map. During that fiscal year, for example, the top five districts accounted for only 25 percent of the national total. In short, this harsh crime is prosecuted everywhere, and cries out for uniformity.

This Court has already recognized many times that a § 924(c)-related question is inherently one of national importance. Indeed, it has resolved § 924(c) topics in at least a dozen opinions, including *Davis*. *See Deal v. United States*, 508 U.S. 129 (1993); *Smith v. United States*, 508

[5] *Quick Facts — 18 U.S.C. § 924(c) Firearms Offenses (FY 2019)*, U.S. Sentencing Comm'n, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY19.pdf (last visited September 5, 2024).

U.S. 223 (1993); *Bailey v. United States*, 516 U.S. 137 (1995); *Bousley v. United States*, 523 U.S. 614 (1998); *Muscarello v. United States*, 524 U.S. 125 (1998); *Watson v. United States*, 552 U.S. 74 (2007); *Dean v. United States*, 556 U.S. 568 (2009); *Abbott v. United States*, 562 U.S. 8 (2010); *United States v. O'Brien*, 560 U.S. 218 (2010); *Alleyne v. United States*, 570 U.S. 99 (2013); *Rosemond v. United States*, 572 U.S. 65 (2014); *Dean v. United States*, 581 U.S. 62 (2017); and *United States v. Taylor*, 142 S. Ct. 2015 (2022). The Court has even granted a writ of certiorari in yet another § 924(c) case this term: *Delligatti v. United States*, No. 23-825 (argument set for November 12, 2024).

The harm from the Eleventh Circuit's (and the several other circuits') mistake on this innocence-waiver topic will grow unless the Court grants certiorari to clarify the law. District courts within the Eleventh Circuit, Rudolph's home circuit, already "lead the pack in imposing sentences under [§ 924(c)]." *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (en banc) (Jill Pryor, J., dissenting). For that reason, "[i]t is critically important that [the Eleventh Circuit] of all circuits get this right." *Id.* But on this collateral-attack question, it has not. Only this Court can remedy that error.

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

The harm to this Court's interests, too, is tangible. In the super-majority of cases that resolve through a guilty plea, the Eleventh Circuit's rule negates any effect of new substantive rules like *Davis*. Where a defendant has signed a collateral-attack waiver—a non-negotiable provision in

most if not all federal plea agreements—he will be forever barred from retroactive relief. In this way, the Eleventh Circuit rule here undermines this Court's jurisprudential rules on retroactivity. *See, e.g., Welch v. United States*, 578 U.S. 120, 129 (2016) (substantive retroactive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the [government's] power to punish"). It also undercuts—to the point of irrelevance—Congress's own work in 28 U.S.C. § 2255(h)(2) (allowing second or successive motions invoking "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

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

Rudolph advocated below (both in the district courts and the court of appeals) that actual innocence ought to serve as a gateway through the generic collateral-attack waiver, and the appeals courts passed judgment based solely upon that very waiver. Although the panel suggested that even if the exception exists, Rudolph could not qualify because (it believed) we showed legal (not factual) innocence, the panel is wrong. Rudolph's acts (what he *did* in Atlanta and Birmingham) do not match the *elements* of the § 924(c) statute, and that means he is *factually* innocent of that crime. On that topic, too, the panel exacerbated another split, as our argument would have been deemed "factual innocence" under the laws of other circuits, including most recently the Fourth Circuit in *McKinney*. This reasoning makes the Supreme Court's

intervention even more urgent and makes this case a particularly good vehicle to address these issues.

Although one of the district courts below also denied Rudolph's claim based upon procedural default, the Eleventh Circuit chose to not to affirm that portion of the order. In the end, the panel wrote at length on the collateral-attack waiver question, but it landed on the wrong side of the innocence line.

4. Actual innocence must cut a gateway through a collateral-attack waiver.

Innocence *is* relevant. And it always has been. This Court has already held that actual innocence serves as a gateway through other common obstacles: procedural default and the statute of limitations.[6] It is time for this Court to carve an innocence gateway through generic collateral-attack waivers like Rudolph's.

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[6] Congress, too, has marbled innocence into the AEDPA's statutory framework. *See, e.g.*, 28 U.S.C. § 2244(b)(2)(B)(ii) (permitting second or successive habeas petition where "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."); 28 U.S.C. § 2254(e)(2)(B) (authorizing evidentiary hearing where "the facts underlying the claim 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."); and 28 U.S.C. § 2255(h)(2) (permitting second or successive § 2255 motion where "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.")

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

When a defendant (like Rudolph) files a § 2255 motion based on a new, retroactive rule of constitutional law (like *Davis*) he does not quarrel with the validity of the collateral-waiver itself. He asks only, in this rare instance, that he be excused from the waiver's effect.

Here history has proved wrong the parties' understanding of the law at the time of the plea. By definition, a retroactive rule like *Davis* is both new (it was not dictated by precedent) and substantive (it narrowed the scope of criminal conduct targeted by § 924(c)). The rule in *Davis* means that a defendant like Rudolph—whose four § 924(c) convictions are based on a crime which the district courts and the government agree is not a crime of violence—is serving a federal sentence for conduct that is not a crime.

One may say that Rudolph must keep the old promises he made, no matter the effect of *Davis*. This is the perspective adopted by the Eleventh Circuit. *See Rudolph*, 92 F.4th at 1049 ("Rudolph is bound by the terms of his own bargain. . . . We will not disrupt that agreement. He must live with the bargain he struck."). But that view betrays our system's foundational principles of equity and justice. *See, e.g.,* 28 U.S.C. § 2243 (noting that a court shall dispose of a habeas petition "as law and justice require"). "Equitable principles have traditionally governed the substantive law of habeas corpus" and, indeed, it "is an area of the law where equity finds a comfortable home." *Holland v. Florida*, 560 U.S. 631, 646-47 (2010). Again, this Court has created actual-innocence exceptions for

procedural default and the AEDPA's one-year statute of limitations.[7]

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

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

McQuiggin, 569 U.S. at 392. Through these actual-innocence portals, this Court "seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," *Schlup*, 513 U.S. at 324, and shows "sensitivity to the injustice of incarcerating an innocent individual." *McQuiggin*, 569 U.S. at 393.

That sensitivity to injustice should be no less when the procedural obstacle is constructed not by this Court (procedural default) or Congress (the limitations period in

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[7] *Schlup*, 513 U.S. at 314-15, 327-28; *McQuiggin*, 569 U.S. at 392. Even before those cases, the Court endorsed an actual-innocence exception in the context of capital sentencing. *Sawyer*, 505 U.S. at 336. The Court coined the "gateway" metaphor more than thirty years ago. *Herrera v. Collins*, 506 U.S. 390, 404 (1993). "The Court's recognition of an 'actual innocence' gateway through defenses to habeas corpus relief is neither surprising nor controversial." 1 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 2.5 at 100-101 (7th ed. 2017).

28 U.S.C. § 2255(f)), but by the parties. If the motivation of *Schlup* and *McQuiggin* is "to see that federal constitutional errors do not result in the incarceration of innocent persons," then one is hard-pressed to see why the gateway ought not apply to generic waivers written into long-ago plea agreements.

The institutional interests in the *Schlup* and *McQuiggin* gateways are stronger than what we see here. In overlooking a collateral-attack waiver in a plea agreement, a court would undermine the interests only of the parties, or rather, of one party, the Department of Justice, who is generally more than capable of protecting its own interests and who, here, is not the party serving time in federal prison. The balance of tradition and equities favor the application of an actual-innocence exception here.

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

The Eleventh Circuit opted not to adopt the actual-innocence gateway. The panel relied on the principle that a plea agreement in a criminal case (with its collateral-attack waiver) is a binding contract. The panel expressed a distaste for disrupting a bargain struck many years ago between Rudolph and the government—a bargain in which both parties mistakenly believed Rudolph was guilty of this particular § 924(c) offense:

> 'A plea agreement is, in essence, a contract between the [g]overnment and a criminal defendant.' And because it functions as a contract, a plea agreement 'should be interpreted in accord with what the

> parties intended.' In discerning that intent, the court should avoid construing a plea agreement in a way that would "deprive the government of the benefit that it has bargained for and obtained in the plea agreement.

Rudolph, 92 F.4th at 1043 (citations omitted). The panel recast Rudolph's innocence argument as a gambit for a windfall, and a path that may imperil others:

> But make no mistake—the government is not the only party to benefit from these deals. Defendants trade costly trials and the risk of lengthy sentences for the certainty offered by a guilty plea to a lesser set of charges. And confidence about the meaning of terms in a plea agreement helps defendants in the long run by reducing transaction costs and making plea agreements worthwhile for the government to strike.

Id. (citations omitted).

It is simply not true that by invoking the retroactive *Davis* opinion Rudolph has caused prospective damage to the government and to defendants everywhere. The panel points to no evidence that prosecutors will be less motivated to inscribe waivers into plea agreements, simply on the unlikely chance that many years later this Court might proclaim a retroactive rule of constitutional law that renders an act once thought to be a crime a non-crime.

We do not dispute the proposition that a defendant may bargain away benefits and must later be held to that bargain. But the concern over contractual promises must

give way when the petitioner is innocent of the crime to which he once pled guilty. This is a modest proposal. In the context of civil contracts, for example, courts permit escape hatches for "unconscionable" bargains, and it ought to be no different here, where a defendant's long-ago promise has now led him to serve a prison term for an act that is no crime at all.[8] If the law exempts parties from obligations penned into certain civil contracts, where the stakes are lower, then surely rare exemptions ought to apply to contracts signed in criminal cases.

The Eleventh Circuit panel failed to explain why a generic waiver requires that innocent persons must never have their constitutional claims heard. The panel did not even attempt to convince us that general contract law is more sacred than a defendant's actual innocence.

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

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

must be enforced, innocence is the rare and extraordinary exception.

This outcome would mirror even the views of Judge Friendly, an avatar of the finality-and-federalism school of habeas law. "[T]he test on collateral attack generally should be not whether the error could have affected the result but whether it could have caused the punishment of an innocent man." Friendly, 38 U. CHI. L. REV. at 157 n.81. As Judge Friendly observed: "the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional *or because the sentence was one the court could not lawfully impose*." *Id.* at 151 (citations omitted) (emphasis added).

Innocence is heavy in the habeas air these days. *See Brown v. Davenport*, 596 U.S. 118, 132 (2022) (concluding that "guilt[]" is a primary consideration in evaluating whether "law and justice" [per 28 U.S.C. § 2243] merit granting relief). Yet the Eleventh Circuit has now immunized the collateral-attack waiver from innocence. We say the interests here are no more special than the public policy concerns animating the procedural default doctrine (including finality, comity, and respect for state courts) and the statute of limitations (a statute written by a coequal branch of government and permitting no textual exceptions). In those settings, says this Court, innocence is relevant. It ought to say so here, too, with a collateral-attack waiver.

CONCLUSION

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

Respectfully Submitted,

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