No.

In the Supreme Court of the United States

MICHAEL DEWAYNE LAIRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Dretke v. Haley*, 541 U.S. 386, 392 (2004), this Court recognized "a growing divergence of opinion in the Courts of Appeals" regarding whether the actual innocence exception to the habeas corpus procedural bar rule applies to noncapital sentencing errors. Then, as today, the Eighth and Tenth Circuits held that there is "no actual innocence exception for noncapital sentencing error," while the Second and Fourth Circuits held that the exception "applies in [the] noncapital sentencing context" where the petitioner was erroneously found eligible for a career or habitual offender sentence enhancement. *Id.* Ultimately, this Court did not resolve the question.

Since *Dretke*, the conflict has only deepened with lower courts in disarray on the applicability and scope of the actual innocence exception to noncapital sentencing errors. As a result, similarly situated defendants receive dramatically different treatment depending solely on the circuit in which they were sentenced.

Here, although "no one disputes" that petitioner did not commit three prior "serious drug offenses" to trigger his 15-year mandatory minimum sentence enhancement under the Armed Career Criminal Act, Pet. App. 18a, the court below declined to apply the actual innocence exception. The court held that the erroneous "misclassification of a predicate offense for a sentencing enhancement is" only "legal innocence" that "does not open the actual innocence gateway" in a noncapital case. Pet. App. 14a.

The question presented is: Whether an individual who did not commit the qualifying predicate offenses required to trigger the Armed Career Criminal Act's 15-year mandatory minimum sentence enhancement in a noncapital case can assert the actual innocence exception to procedural bars on habeas corpus relief.

RELATED PROCEEDINGS

U.S. District Court for the Southern District of Indiana (S.D. Ind.):

United States v. Lairy, Case No. 16-cr-57 (June 18, 2018) (judgment in criminal case)

Lairy v. United States, Case No. 20-cv-144 (Sept. 27, 2023) (denying 28 U.S.C. § 2255 petition and granting certificate of appealability)

U.S. Court of Appeals for the Seventh Circuit (7th Cir.):

Lairy v. United States, Case No. 23-2957 (July 7, 2025) (affirming holding that actual innocence exception did not apply and remanding on equitable tolling)

Lairy v. United States, Case No. 23-2957 (Sept. 10, 2025) (denying petition for rehearing en banc)

Supreme Court of the United States:

Lairy v. United States, No. 25A653 (Dec. 4, 2025) (granting application for extension of time to file petition for a writ of certiorari)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. App. 1a-18a) is published at 142 F.4th 907. The order of the court of appeals denying rehearing en banc (Pet. App. 39a) is unreported. The decision of the United States District Court for the Southern District of Indiana (Pet. App. 19a-35a) is unpublished but available at 2023 WL 12107952.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2025. The court of appeals denied a timely petition for rehearing en banc on September 10, 2025. On December 5, 2025, Justice Barrett extended the time within which to file a petition for a writ of certiorari until February 7, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are reproduced in the petition appendix at Pet. App. 40a-48a.

STATEMENT

"[T]he historic function of habeas corpus" is to "provide relief from unjust incarceration." *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986); *see generally* Henry Friendly, *Is Innocence Irrelevant?, Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). Its "prime objective" "should be to protect the innocent." Friendly, J., *supra*, at 151 n.37. Traditional concerns about finality on habeas recede when a prisoner demonstrates the law does not authorize his confinement. "The policy against incarcerating . . . an innocent man . . . should far outweigh the desired termination of litigation." *Id.* at 150 (citation omitted).

This Court has thus held that a petitioner may receive habeas relief—even if his claim is otherwise barred by the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitations period—if he can demonstrate "actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). "In other words, 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." *Id.* at 392. This rule "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Id.* (citation omitted).

The actual innocence exception applies not only to claims of innocence of the underlying crime, but also "the accuracy of the . . . sentencing determination." *Smith v. Murray*, 477 U.S. 527, 539 (1986). In *Sawyer v. Whitley*, 505 U.S. 333 (1992), this Court confirmed that the exception applies to *capital* sentencing errors.

Since *Sawyer*, the courts of appeals have split over both the applicability and scope of the exception to *noncapital* sentencing errors. In *Dretke v. Haley*, 541 U.S. 386 (2004), the Court noted a divergence in the courts of appeals. Since then, the conflict has deepened, and judges on the lower courts have urged this Court to grant review to resolve the question presented here.

This is the ideal case to do just that. The Seventh Circuit, expressly joining one side of the circuit divide, rejected petitioner's claim as untimely under AEDPA's one-year limitations period, even though petitioner did not commit the three prior "serious drug offenses" used to trigger his 15-year mandatory minimum prison term enhancement under the Armed Career Criminal Act (ACCA). The court declined to apply the actual innocence exception on the theory that errors of this type constitute only "legal innocence," not "factual innocence." Thus, as

the Seventh Circuit acknowledged, "Lairy is serving additional time in prison that no one disputes would be improper if he were sentenced today." Pet. App. 18a. It is long past time for this conflict to be resolved.

This case presents a rare, procedurally clean vehicle to do so. Petitioner had counsel appointed below in recognition of the strength of his claims, uncommon during habeas review, and the issues accordingly were developed and preserved with the guiding hand of counsel. The government conceded that petitioner's sentence enhancement was erroneous, and his continued incarceration relies exclusively on procedural default. Pet. App. 18a. The Seventh Circuit squarely passed on the question. And although the conflicts and confusion have multiplied over the years, because of procedural complications common to this area of the law, this petition is one of few squarely presenting the question presented to the Court.

This is a textbook case for plenary review. The Court should grant the petition.

A. Statement of the Case

1. Federal law prohibits any felon from possessing a firearm. 18 U.S.C. § 922(g)(1). During the relevant period here, a person who violated § 922(g) could be sentenced to imprisonment for up to 10 years. *Id.* § 924(a)(2). In some cases, however, the ACCA imposes a more severe penalty. Under the ACCA, a person who possesses a firearm after three or more convictions for a "serious drug offense" or a "violent felony" is subject to a minimum sentence of 15 years and a maximum of life in prison. *Id.* § 924(e)(1). "Because the ordinary maximum sentence for a felon in possession of a firearm is 10 years, while the minimum sentence under the Armed Career Criminal Act is 15 years, a person sentenced under the Act will receive a prison term at least five years longer than the law

otherwise would allow." *Welch v. United States*, 578 U.S. 120, 122-23 (2016).[1]

2. Petitioner Michael Lairy was convicted under 18 U.S.C. § 922(g)(1) for possession of a firearm after having a prior felony conviction. Pet. App. 2a. At the time, the statutory maximum sentence was 10 years, *id.*, and the advisory range under the Sentencing Guidelines was approximately four to five years (51-63 months). Pet. App. 78a (citing Crim. Dkt. 30 at 5, 15; U.S. Sentencing Guidelines Ch. 5, pt. A). But the government also indicted petitioner under the ACCA, *see* 18 U.S.C. § 924(e)(1), contending that he had prior convictions for "serious drug offenses" that triggered a mandatory sentence enhancement with a sentencing range of 15 years to life. Pet. App. 2a. On the advice of his then-counsel, petitioner accepted a plea to the ACCA's 15-year minimum sentence to avoid the potential maximum of life behind bars. *Id.* (citing 18 U.S.C. § 924(e)(1)).

At sentencing, the district court stated that "180 months, which is the statutory minimum . . . is a stiff sentence . . . but that's what Congress has determined is the sentence here for someone who has committed this crime and has the criminal history that you have." Sent'g Tr. at 16, No. 16-cr-00057 (S.D. Ind.), Dkt. 45. Still, the court noted that it likely would have reduced the sentence if it had discretion to do so: "I have no discretion to go below [15 years]. If I did, more than likely I would but I really don't have any discretion here to go below that sentence." *Id.*; *see also* Pet. App. 79a. Petitioner's then-counsel did not object to the application of the ACCA

[1] Petitioner was sentenced before § 924 was amended in 2022 to impose a 15-year maximum sentence for violations of § 922(g). *See* Pub. L. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022) (amending 18 U.S.C. § 924(a)(2) and adding § 924(a)(8)).

during the plea or sentencing, and petitioner did not appeal. Pet. App. 2a.

3. As it turned out, the government and petitioner's appointed counsel were incorrect: petitioner did not have three previous "serious drug convictions" under state law that served as predicates for an ACCA sentence enhancement. *See* Pet. App. 4a, 18a. "For a state crime to qualify as a 'serious drug offense,' it must carry a maximum sentence of at least 10 years' imprisonment, and it must 'involv[e] . . . a controlled substance . . . as defined in section 102 of the Controlled Substances Act.'" *Brown v. United States*, 602 U.S. 101, 105 (2024) (quoting 18 U.S.C. §§ 924(e)(1), (2)(A)(ii)) (alterations in original). "A state drug offense counts as an ACCA predicate only if the State's definition of the drug in question 'matche[s]' the definition under federal law." *Id.* (citation omitted). Petitioner's state drug convictions that served as the necessary predicates for his ACCA charge did not "match" the federal definition. Pet. App. 4a.

Proceeding without counsel, petitioner sought habeas relief under 28 U.S.C. § 2255. Pet. App. 3a. After reviewing the petition and government's response, the district court observed that a "review of [petitioner's] presentence investigation report reveals that he was understood to be subject to a statutory 15-year mandatory minimum sentence because of his prior convictions," but that petitioner's Indiana offenses that served as the ACCA predicates "have since been held not to qualify as serious drug offenses under the ACCA." Pet. App. 36a-37a. "The United States did not address this argument, contending that it is too vague and unclear to confront. The court agrees that this argument requires further development," and appointed petitioner habeas counsel. Pet. App. 37a.

With the assistance of counsel, petitioner asserted that his sentence was erroneous because he did not

commit the predicate acts necessary for imposition of a sentence enhancement under the ACCA and his plea was therefore based on the ineffective assistance of counsel. Pet. App. 4a.

4. The district court denied habeas relief. The court recognized that "Mr. Lairy is correct that his prior Indiana convictions" were "not 'serious drug offenses' under the ACCA. And it may be the case that counsel provided ineffective assistance" by not raising the error. Pet. App. 27a (internal citation omitted). The government likewise did not "challenge the merits of Lairy's claim." *Id.* Nevertheless, the court agreed with the government that petitioner had failed to bring the claim within AEDPA's one-year limitations period and that the actual innocence exception to any procedural default did not apply "to dispute the propriety of a sentence enhancement under the ACCA." Pet. App. 34a.

B. The Decision Below

The Seventh Circuit affirmed the district court's holding that the actual innocence exception did not apply. The court acknowledged that the government conceded that petitioner's sentence "would be improper if he were sentenced today." Pet. App. 18a; *accord* U.S. Br. at 32, No. 23-02957 (7th Cir.), Dkt. 22 ("Lairy would not be an armed career criminal if sentenced today."). But the court found the claim barred under § 2255's one-year limitations period. Pet. App. 4a. The Seventh Circuit observed that "[t]he Supreme Court has not yet addressed whether a petitioner can be actually innocent of a non-capital sentence," that the lower courts are divided on the question, and that the Seventh Circuit's own decisions are in "dispute." Pet. App. 12a. If the exception applied to noncapital sentencing errors, the court determined, "Lairy's argument fails because it is one of legal, not factual innocence." *Id.*

The Seventh Circuit reasoned that "[a]ctual innocence 'means factual innocence, not mere legal insufficiency.'" *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). Noting that petitioner "contends that the district court misclassified his Indiana convictions as serious drug offenses," the court "join[ed] several of [its] sister circuits in holding that the misclassification of a predicate offense for a sentencing enhancement is legal innocence that does not open the actual innocence gateway." Pet. App. 13a-14a.

The Seventh Circuit recognized that the Ninth and Eighth Circuits have held that the actual innocence exception applies to errors like the ones in this case, but it "declin[ed] to adopt these approaches here, finding the decisions of the First, Fourth, Fifth, and Eleventh Circuits more persuasive." Pet App. 14a.

"Without access to the actual innocence gateway," the court concluded, "Lairy must rely on equitable tolling." Pet. App. 18a. The court held that the district court erred in finding no tolling without considering a hearing, and remanded. Pet. App. 15a-17a, 18a.[2]

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[2] A hearing on tolling would be completely unnecessary if the court had applied the actual innocence exception. *See McQuiggin*, 569 U.S. at 392 (actual innocence "overcome[s] AEDPA's one-year statute of limitations" without establishing tolling). Defendants rarely satisfy the "extraordinary circumstances" standard to obtain tolling, *see Holland v. Florida*, 560 U.S. 631, 649 (2010); Jonathan Atkins et al., *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 Stan. L. Rev. 427, 470-71 (2016) (discussing "grossly unfair" tolling standard and outcomes). Regardless, as the government has repeatedly argued, "the possibility that [a petitioner] might ultimately be able to identify [an alternative ground for prevailing] would not prevent the Court from addressing the questions presented." Cert. Reply Br. of U.S. at 10, *Match-E-Be-Nash-She-Wish Band v. Patchak*, 567 U.S. 209 (2012) (Nos. 11-246, 11-247); Cert. Reply Br. of U.S. at 8, *Astrue v. Capato*, 566 U.S. 541 (2012) (No. 11-159); *see also* Cert. Reply Br. of U.S. at

The court below concluded by emphasizing that "Lairy is serving additional time in prison that no one disputes would be improper if he were sentenced today. But he brought his ACCA claims too late." Pet. App. 18a.

REASONS FOR GRANTING THE PETITION

I. There Are Deep and Acknowledged Splits About Whether and When the Actual Innocence Exception Applies to Noncapital Sentence Enhancement Errors

This Court's review is needed to resolve entrenched conflicts over the applicability and scope of the actual innocence exception to habeas procedural default to noncapital sentencing errors.

In *Sawyer v. Whitley*, 505 U.S. 333 (1992), this Court confirmed that the actual innocence exception applies to capital sentencing errors. In *Dretke v. Haley*, 541 U.S. 386 (2004), the Court granted review to address whether the exception also applies to noncapital sentencing errors. The Court acknowledged a "growing divergence of opinion in the Courts of Appeals," but ultimately did not reach the question. *Id.* at 392. Then, as today, the Eighth and Tenth Circuits held that there is "no actual innocence exception for noncapital sentencing error," while the Second and Fourth Circuits held that the exception "applies in [the] noncapital sentencing context" when the

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10, *Garland v. Singh*, 602 U.S. 447 (2024) (No. 22-884) (there is "no reason to deny review," even if respondents "could still prevail on alternative grounds on remand").

Here, the district court denied an indeterminant stay of an equitable tolling hearing pending this Court's review, instead ordering that petitioner provide reports on the status of this Court's proceedings. Petitioner provided a status report on December 26, 2025, and on December 31, 2025, the court ordered petitioner to submit another status report within 60 days. No. 20-cv-00144 (S.D. Ind.), Dkt. 55.

petitioner was erroneously found eligible for a career or habitual offender sentence enhancement. *Id.*

Since *Dretke*, the conflict has widened and become more entrenched, with lower courts calling out for this Court's guidance. Review is particularly warranted given that much of the confusion results from conflicting interpretations of this Court's decisions in *Sawyer* and *Bousley*. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.5 (11th ed. 2019) (review often granted "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification").

A. The Eighth and Tenth Circuits Apply the Actual Innocence Exception Only to Capital Sentencing Errors

In a "divergence of opinion" from other circuits, *Dretke*, 541 U.S. at 392, the Eighth and Tenth Circuits have held that the actual innocence exception categorically does not apply to noncapital sentencing errors. *E.g.*, *Embrey v. Hershberger*, 131 F.3d 739, 741 (8th Cir. 1997) (en banc); *United State*s *v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993).

1. In *Embrey*, a habeas petitioner asserted that he was illegally sentenced to two consecutive 20-year terms for violating the Federal Bank Robbery Act and the Federal Kidnapping Act. 131 F.3d at 739. He claimed that his second sentence under the Federal Kidnapping Act was unlawful because the Federal Bank Robbery Act fully encompassed both the kidnapping and bank robbery.

In a divided en banc decision, the Eighth Circuit held that the petitioner had procedurally defaulted, and that the actual innocence exception did not apply. *Id.* at 740-41. The majority reasoned that this Court's decision in *Sawyer* implicitly limited the exception to capital

sentencing errors and precluded it in the context of a noncapital case. *Id.*

The dissenting judges disagreed, noting that "the majority opinion contradicts the law of other courts of appeals" and "misreads *Sawyer*." *Id.* at 742-43 (Lay, J., dissenting). The dissent explained that "there exists no valid reason to restrict the *Sawyer* analysis to cases challenging capital sentences." *Id.* at 743. "An individual is either eligible or not eligible to receive a particular sentence. If an individual receives a sentence for which he or she is not eligible, the [*Sawyer*] eligibility test allows a court to reach the sentence and to correct or vacate that sentence." *Id.* at 744. "It is unfathomable that a federal court lacks the power to vacate an illegal sentence of twenty years . . . . Societal respect for individual liberty requires more." *Id.* at 749.

2. The Tenth Circuit similarly has read *Sawyer* to categorically limit the actual innocence exception to capital sentencing errors. In *Richards*, the defendant claimed that the district court had improperly enhanced his sentence because it had miscalculated the weight of a controlled substance "in determining the base level offense." 5 F.3d at 1370. The court declined to apply the actual innocence exception because "[a] person cannot be actually innocent of a noncapital sentence." *Id.*[3]

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[3] *Accord Mccelhaney v. Bear*, 700 Fed. App'x 872, 875 (10th Cir. 2017) ("[U]nder our precedent, a petitioner cannot be actually innocent of a non-capital sentence."); *Laurson v. Leyba*, 507 F.3d 1230, 1233 (10th Cir. 2007) ("A person cannot be actually innocent of a noncapital sentence."); *Reid v. Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996) ("[B]ecause a person cannot be actually innocent of a noncapital sentence, petitioner's challenge to his recidivist enhancement does not fall within" the exception (cleaned up)).

B. The First, Second, Fourth, Fifth, Ninth, and Eleventh Circuits Apply the Exception in the Noncapital Context But Are Divided on Its Scope

In contrast to the Eighth and Tenth Circuits, most circuits have held that the actual innocence exception can apply to noncapital sentencing errors, but only for claims of "factual"—as opposed to "legal"—innocence.

These courts are divided about what "factual innocence" and "legal innocence" mean in the noncapital sentencing context. Several circuits have defined "factual innocence" narrowly to exclude claims that a sentence was enhanced based on a court's erroneous determination that a prior conviction qualified as a predicate offense. *See Damon v. United States*, 732 F.3d 1, 6 (1st Cir. 2013); *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 171 (2d Cir. 2000); *United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010); *United States v. Vargas-Soto*, 35 F.4th 979, 1000 (5th Cir. 2022); *McKay v. United States*, 657 F.3d 1190, 1198 (11th Cir. 2011). To these courts, such sentencing enhancement errors constitute claims of only "legal innocence" not eligible for the actual innocence exception.

The Ninth Circuit has split from that approach, holding that such errors constitute claims of "factual innocence" and that the actual innocence exception applies. *Allen v. Ives*, 950 F.3d 1184, 1190 (2020), *reh'g en banc denied*, 976 F.3d 863 (2020). And the Eighth Circuit, in a decision creating an intra-circuit split, likewise has held that the actual innocence exception applies to a noncapital sentencing error like the one here. *Lofton v. United States*, 920 F.3d 572, 576-77 (8th Cir. 2019).

1.a. In the First Circuit, the actual innocence exception does not apply where the sentencing court erroneously finds that a defendant's prior conviction was a "crime of violence" that triggered an enhanced sentence under the Sentencing Guidelines. *Damon*, 732 F.3d at 2,

5-6. "Assuming that the 'actual innocence' exception is even applicable in this context," *id.* at 5, the court held that because the defendant "contest[ed] only the categorization of his prior conviction as a crime of violence," he failed to "plead[] 'actual innocence' as defined in *Bousley*." *Id.* at 6.

b. The Second Circuit has held that "there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures," explicitly splitting with the Tenth and Eighth Circuit's approach. *Spence*, 219 F.3d at 171 (discussing *Richards*, 5 F.3d at 1371). *Spence* did not address whether enhancement errors are claims of "factual" or "legal" innocence, but a panel of the Second Circuit later rejected a petitioner's "essentially legal argument that he is innocent of the sentencing enhancement because the district court misclassified his predicate offenses under the Guidelines." *Darby v. United States*, 508 Fed. App'x 69, 71 (2d Cir. 2013).

c. The Fourth Circuit also has held that "the actual innocence exception may be applied in § 2255 to noncapital sentencing proceedings," but only for claims of "factual innocence"—"a petitioner must demonstrate actual factual innocence of the offense of conviction, i.e., that petitioner did not commit the crime of which he was convicted." *Pettiford*, 612 F.3d at 282 (internal citation omitted). In *Pettiford*, the court determined that the petitioner was not factually innocent because he claimed "that this conviction should not have been classified as a 'violent felony' under the ACCA" but did not dispute that he "actually commit[ted]" the underlying crime. *Id.* at 284; *accord United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999) ("[A]ctual innocence applies in non-capital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision.").

d. The Fifth Circuit similarly held that the exception did not apply for a petitioner who claimed that "none of his prior convictions qualif[ied] for the sentencing enhancement for an 'aggravated felony' under [8 U.S.C.] § 1326(b)." *Vargas-Soto*, 35 F.4th at 999. The court reasoned that the petitioner "d[id] not claim *factual innocence* of his conviction," but raised only "a legal argument." *Id.* at 1000.

e. Presuming the actual innocence exception applies in the noncapital context, the Eleventh Circuit likewise declined to apply the exception where a petitioner made what the court called a "purely legal argument that he [was] actually innocent of his career offender sentence because his prior conviction for carrying a concealed weapon should not have been classified as a 'crime of violence' under the Guidelines." *McKay*, 657 F.3d at 1199. Because the petitioner did not argue "that he did not actually commit the crime of carrying a concealed weapon," he was not "factual[ly] innocen[t] of the predicate offense." *Id.*

2. The Ninth Circuit has split from the decisions above, holding that sentence enhancement errors are claims of "factual," not "legal" innocence, and the actual innocence exception applies. *Allen*, 950 F.3d at 1190. In *Allen*, the petitioner was sentenced as a career offender because he had two prior state drug convictions, which, at the time were classified as predicate "controlled substance offenses." *Id.* at 1186. The petitioner did not "challenge the validity of his conviction for sales of marijuana under" state law, but he contended that his state conviction was "not a conviction for a predicate crime"—i.e., that he was "actually innocent of a crime that would qualify him for career offender status, and [was] therefore actually innocent of the sentence that was imposed." *Id.* at 1188.

a. In a divided decision, the majority held that if the petitioner were to "prevail[] on the merits of his claim that his Connecticut marijuana conviction was not a predicate conviction for career offender status under the Guidelines," that would mean "the factual predicate for his mandatory sentencing enhancement did not exist." *Id.* at 1189. "That is, he is actually innocent of the enhancement. In that case, it is beyond dispute that he is not, and was not, a career offender." *Id.*

The dissent—noting that "there is currently a circuit split on this issue"—argued that the actual innocence exception should not have applied because the claim was "purely legal." *Id.* at 1199 (Callahan, J., dissenting). Judge Callahan argued that "the purely legal argument that a petitioner was wrongly classified as a career offender under the Sentencing Guidelines is not cognizable as a claim of actual innocence." *Id.* (citation omitted).

The government sought rehearing en banc, arguing that the petitioner was not "factually innocent," where his claim was that he was wrongly classified as a career offender. Br. for the U.S. at 11, No. 18-35001 (9th Cir.), Dkt. 54. The government sought rehearing in part because the panel's decision was "inconsistent with the reasoning of other circuits" which have "concluded that the incorrect application of a sentencing enhancement is not the same as 'actual innocence.'" *Id.* at 12.

b. The Ninth Circuit denied rehearing en banc in a fractured vote. *See* 976 F.3d at 864. The panel majority elaborated on their original decision, observing that the "legal innocence" standard employed by the dissent and other circuits stems from a misinterpretation of this Court's decision in *Bousley*. *See id.* at 866 (Fletcher, J., concurring in the denial of the petition for rehearing en banc). Judge Fletcher agreed "that there is a circuit split" and that "the Supreme Court should grant certiorari—in

this or in some other case—to resolve the circuit split." *Id.* at 868.

The dissent from denial of rehearing tracked the First, Second, Fourth, Fifth, and Eleventh Circuits' approaches, arguing that "the Supreme Court's holding in *Bousley*" means that a challenge to a "career offender" enhancement is a claim of legal insufficiency, not factual innocence. *Id.* at 872 (Nelson, J., dissenting from the denial of rehearing en banc).

c. Like the Ninth Circuit, the Eighth Circuit, creating an intra-circuit conflict with the *Embrey* decision discussed above (which found that the exception never applies to noncapital sentencing errors), held that the exception applies to sentencing enhancements like the one here. "The district court erred in determining that [the defendant's] drug conviction qualifies as a serious drug offense . . . . His illegal sentence presents a 'miscarriage of justice' that § 2255 permits us to correct, despite his failure to raise the issue earlier." *Lofton*, 920 F.3d at 576-77.

C. The Decision Below Deepens the Circuit Split

The Seventh Circuit has issued conflicting decisions on the applicability and scope of the actual innocence exception to noncapital sentencing errors, culminating in the decision below.

In *Mills v. Jordan*, 979 F.2d 1273 (7th Cir. 1992), the court allowed a defendant to "attack[] a sentence enhancement on the ground that one of the predicate convictions was invalid." *Id.* at 1278. There, the petitioner's two-year sentence for auto theft had been "enhanced by 30 years under the habitual offender statute." *Id.* at 1275. He brought a habeas claim alleging that one of his predicate convictions was constitutionally defective and that, therefore, he should not have been sentenced as a habitual offender. *Id.* The court concluded

that the petitioner's claim was "similar to that considered in *Sawyer*." *Id.* at 1279. "In both cases, the sentencing decision resembled a factual determination of guilt or innocence." *Id.* at 1278-79. As in *Sawyer*, the petitioner in *Mills* was "not claiming that he [was] innocent of the Indiana auto theft, but rather that he [was] innocent of a fact (the 1965 larceny conviction) necessary to sentence him as an habitual offender." *Id.* at 1279.

A different panel later limited the exception. In *Hope v. United States*, 108 F.3d 119 (7th Cir. 1997), a petitioner challenged whether his "sentence was properly enhanced on the basis of his being a career criminal." *Id.* at 120. Because the petitioner had already filed a habeas petition, his claim was governed by AEDPA's amended rules for second or successive petitions. *Id.* The court concluded it "d[id] not think the [actual innocence] exception survives the amendment." *Id.* It held that a "successive motion under 28 U.S.C. § 2255 . . . may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence." *Id.*; *accord Woodson v. Mlodzik*, 129 F.4th 1036, 1042 (7th Cir. 2025) ("[A] petitioner may not introduce new evidence under § 2254(e)(2) if they are claiming innocence with respect to a sentence." (citing *Hope*, 108 F.3d at 120)).

In the decision below, the Seventh Circuit recognized that its caselaw regarding "whether a petitioner can be actually innocent of a non-capital sentence" is in "dispute." Pet. App. 12a. The court concluded that *Hope* abrogated *Mills*, "at least in the context of successive petitions." *Id.* If the exception applies in the noncapital context, the court held that it is limited to claims of "factual" as opposed to "legal" innocence. Pet. App. 12a-13a.

As to whether petitioner's claim was one of "factual innocence," the Seventh Circuit joined the First, Second, Fourth, Fifth, and Eleventh Circuits in concluding that

"the misclassification of a predicate offense for a sentencing enhancement is legal innocence that does not open the actual innocence gateway." Pet. App. 13a-14a. The court acknowledged that it was splitting with the Ninth Circuit and the Eighth Circuit's decision in *Lofton*. Pet. App. 14a (citing *Allen*, 950 F.3d at 1190, and *Lofton*, 920 F.3d at 576-77). But it found "the decisions of the First, Fourth, Fifth, and Eleventh Circuits more persuasive." *Id.* (citing *Damon*, 732 F.3d at 6; *Pettiford*, 612 F.3d at 283-84; *Vargas-Soto*, 35 F.4th at 1000; *McKay*, 657 F.3d at 1199).

D. The Lower Courts Have Repeatedly Acknowledged the Conflicts and Called for This Court's Review

This is a rare case in which this Court has acknowledged an unresolved conflict in the lower courts. *See Dretke*, 541 U.S. at 392.

The conflict has deepened since *Dretke*, with no fewer than eight circuits explicitly noting the problem. *See, e.g.*, *Damon*, 732 F.3d at 4 n.4 ("At least two circuits have extended the exception to non-capital sentencing errors . . . . Two other circuits, on the other hand have limited it to capital sentences."); *Cristin v. Brennan*, 281 F.3d 404, 421 (3d Cir. 2002) ("The courts of appeals have split on the question of whether the miscarriage of justice rationale can extend to non-capital sentencings."); *Mikalajunas*, 186 F.3d at 494 ("The [Supreme] Court has not addressed whether the actual innocence exception can be applied to sentencing outside the capital context, and this question has divided the courts of appeals"); *Gibbs v. United States*, 655 F.3d 473, 478 (6th Cir. 2011) ("[T]he Courts of Appeals disagree over whether the actual innocence exception applies to noncapital sentencing cases"); Pet. App. 13a-14a (similar); *Allen*, 950 F.3d at 1199 (Callahan, J., dissenting) ("[T]here is currently a circuit split on this issue."); *McKay*, 657 F.3d at 1197

("Several of our sister circuits . . . have spoken on the issue but have reached divergent conclusions."); *see also United States v. Maybeck*, 23 F.3d 888, 893 (compiling cases in the split); *Spence*, 219 F.3d at 171 (same).

A leading habeas treatise has highlighted and discussed the conflicts. *See* Brian R. Means, *Federal Habeas Manual* § 9B:77 (2025) ("The circuit courts that have decided this issue are split.").

And judges on the courts of appeals have called out for this Court's guidance: "[T]he Supreme Court should grant certiorari . . . to resolve the circuit split." *Allen*, 976 F.3d at 868 (Fletcher, J., concurring in the denial of the petition for rehearing en banc). "'[W]hether and to what extent the exception extends to non-capital sentencing error' is a difficult unanswered question," *Ross v. Berghuis*, 417 F.3d 552, 557 (6th Cir. 2005) (alterations in original; citation omitted), and "[w]ithout Supreme Court guidance," the courts of appeals will remain divided, *Gibbs*, 655 F.3d at 478.

Beyond resolving the clear divide, review is needed to provide district courts with clear standards in the workaday of resolving habeas petitions. "In the absence of clear guidance from the Supreme Court, the lower federal courts have struggled to divine the proper scope of *Sawyer*." *Enoch v. Gramley*, 861 F. Supp. 718, 734 (C.D. Ill. 1994); *accord Cobb v. Warden, Chillicothe Corr. Inst.*, 776 F. Supp. 2d 578, 602 (S.D. Ohio 2011) ("In the absence of guidance from the Supreme Court, some circuit courts have held that the exception does not extend to any claims of sentencing error in noncapital cases."). This is not only because of the inter-circuit divide over the interpretation of this Court's precedents, but also because of intra-circuit conflicts. For instance, although the Eighth Circuit, en banc, found the actual innocence exception never applies to noncapital sentencing errors, *see supra* Part I.A.1 (discussing *Embrey*), a panel decision

has taken a contrary view. *See Lofton*, 920 F.3d at 577-78. This has required district courts to try to untangle the "complicated" caselaw. *United States v. Bugh*, 459 F. Supp. 3d 1184, 1191-94 (D. Minn. 2020) (discussing confusing Eighth Circuit decisions and lack of clear guidance). Indeed, the decision below acknowledged the Seventh Circuit's own conflicting decisions. Pet. App. 12a; *see also Allen*, 976 F.3d at 875 (Callahan, J., dissenting from the denial of rehearing en banc) (arguing that the panel was "creat[ing] an intra-circuit conflict").

No further percolation is needed, particularly because the conflict and confusion have grown exponentially since *Dretke*. Only this Court can resolve the intractable divide and provide direction to the lower courts. The Court should grant review in this case.

II. Lower Courts Have Erroneously Concluded That the Actual Innocence Exception Does Not Apply to Noncapital Sentence Enhancement Errors

A. Courts Holding That the Exception Never Applies to Any Noncapital Sentencing Errors Misconstrued *Sawyer*

1. In *Sawyer*, the Court held that a petitioner in a capital case can invoke the actual innocence exception if he can show either (a) "innocence of the capital crime itself" or (b) "that there was no aggravating circumstance or that some other condition of eligibility had not been met." 505 U.S. at 345. Specifically, the actual innocence exception applies if the petitioner can show that he is innocent of any of "those elements that render a defendant eligible for the death penalty." *Id.* at 347.

Though *Sawyer* was decided in the context of capital sentencing errors, its reasoning—as the majority of lower courts have held—applies equally to noncapital sentencing errors. *Sawyer* applied an "eligibility test" to determine if a defendant is "actually innocent" of the

sentence. To satisfy that test, a petitioner must show "a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Id.* at 346 (citation omitted). This test "hones in on the objective factors or conditions that must be shown to exist before a defendant is eligible to have the death penalty imposed." *Id.* at 347.

2. *Sawyer*'s eligibility test counsels granting relief for noncapital sentence-enhancement errors. To determine whether a predicate crime qualifies for a sentence enhancement involves "objective factors" that a rational finder of fact would have to determine to hold a petitioner eligible for the sentence—"facts which are prerequisites under state or federal law for the imposition of" a sentence enhancement. *Id.* at 346-47. There is "little difference between holding that a defendant can be innocent of the acts required to enhance a sentence in a death case and applying a parallel rationale in non-capital cases." *Maybeck*, 23 F.3d at 893; *accord, e.g.*, *Mills*, 979 F.2d at 1278-79 ("In both [capital and noncapital] cases, the sentencing decision resembled a factual determination of guilt or innocence. Such a determination is one to which the actual innocence exception typically applies.").

In the sentencing enhancement context, if the "prior conviction is not a conviction for a predicate crime," the defendant "is therefore actually innocent of a predicate crime, and . . . thus actually innocent of the mandatory sentencing enhancement." *Allen*, 950 F.3d at 1190; *accord Embrey*, 131 F.3d at 744 (Lay, J., dissenting) ("If an individual receives a sentence for which he or she is not eligible, the [*Sawyer*] eligibility test allows a court to reach the sentence and to correct or vacate that sentence."). This interpretation furthers "the critical

function of habeas review [of] 'correcting a fundamentally unjust incarceration.'" *Spence*, 219 F.3d at 171 (quoting *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995)). When a defendant receives a sentence for which they are ineligible, "there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Id.* The Congress that adopted many of Judge Friendly's proposed habeas reforms when it enacted AEDPA was surely aware of his longstanding and firmly stated position that there must be 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." Friendly, J., *supra*, at 160.

The Eighth and Tenth Circuits reached a contrary conclusion by finding that *Sawyer* implicitly signaled that the exception is limited to *only* capital sentencing errors. These courts emphasized that *Sawyer* "characterized its task as 'striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant'" where "the concept of 'actual innocence' is 'easy to grasp.'" *Embrey*, 131 F.3d at 740-41 (quoting *Sawyer*, 505 U.S. at 341). "[T]he most natural inference to draw from these observations," these courts found, "is that in noncapital cases the concept of actual innocence is 'easy to grasp,' because 'it simply means the person didn't commit the crime.'" *Embrey*, 131 F.3d at 740-41 (quoting *Richards*, 5 F.3d at 1371)).

But as the majority of lower courts have found, "the harshness of the sentence does not affect the habeas analysis"; in both the capital and noncapital contexts, "the ultimate issue" is whether the consequence of the error results in an unjust term of incarceration. *Spence*, 219 F.3d at 171; *accord, e.g.*, *Maybeck*, 23 F.3d at 893 ("[A] defendant in either a capital or non-capital case would . . . suffer the same general consequence (an enhanced

sentence) from being held responsible for an act of which he or she is actually innocent."). Habeas rules should not "apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws." *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (quoting *Smith*, 477 U.S. at 538).

At a minimum, given that "language in *Sawyer* . . . is largely responsible for the current dissension among the federal circuit courts," Matthew Mattingly, Note, *Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non-Capital Cases*, 93 Ky. L.J. 531, 542 (2004-2005), only this Court can resolve the question once and for all.

B. Courts Holding That the Exception Does Not Apply to Sentence Enhancement Errors Misconstrued *Bousley*

This Court has noted that "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623 (citing *Sawyer*, 505 U.S. at 339). Relying on this language from *Bousley*, the decision below and other circuits have held that an erroneous determination that a defendant had a prior conviction that qualified as a predicate for a sentence enhancement is a claim of "legal innocence," not "factual innocence," and thus the actual innocence exception does not apply. But *Bousley* held no such thing, and these types of enhancement errors are properly construed as claims of actual innocence of the sentence.

For one, so-called "misclassification" errors involve erroneous factual determinations, not pure legal questions. This Court has recognized that when a judge makes a determination about whether a prior conviction is a "violent felony" or "serious drug offense" under the ACCA, that involves "factual findings." *Erlinger v. United States*, 602 U.S. 821, 835 (2024); *see also id.* at 851, 855 (Kavanaugh, J., dissenting) (concluding that judges

may "find[] facts related to a defendant's past crimes," including "whether the defendant has three or more prior convictions and whether those convictions were for violent felonies."); *accord Allen*, 976 F.3d at 867 (Fletcher, J., concurring in the denial of the petition for rehearing en banc) (explaining that a judge makes "the determination of a fact" when deciding whether a prior conviction "was, or was not, a conviction for a predicate offense"). Even under the factual/legal innocence construct adopted by the decision below, an error in finding a prior conviction was a "violent felony" or "serious drug offense" is thus a claim of factual, not legal, innocence.[4]

In particular, to determine if the predicate conviction is a "violent felony" or "serious drug offense," courts typically need to determine "what crime, with what elements, the defendant was convicted of." *Erlinger*, 602 U.S. at 839 (citation omitted). "[T]o answer those questions, a sentencing court may sometimes consult 'a restricted set of materials,' often called *Shepard* documents, that include judicial records, plea agreements, and colloquies between a judge and the defendant." *Id.* (citation omitted). Here, for example, petitioner's "presentence investigation report reveal[ed] that he was understood to be subject to a statutory 15-year mandatory minimum sentence because of his prior convictions," but that turned out to be wrong. Pet. App. 37a; *see supra* Statement.

Similar factual inquiries would be necessary to determine if a prior conviction was a "crime of violence"

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[4] The decision below rejected petitioner's contention that facts underlying an ACCA enhancement must be determined by a jury, not a judge, under *Apprendi*, noting that, "the Supreme Court has questioned this exception, but it remains good law." Pet. App. 11a n.4. Regardless of whether a judge or jury is the finder of fact does not change that they are indeed *facts*, and errors in finding those facts are better interpreted as claims of "factual innocence."

as defined by the Sentencing Guidelines, *Damon*, 732 F.3d at 5-6; *McKay*, 657 F.3d at 1199, or an "aggravated felony" under 8 U.S.C. § 1326(b), *Vargas-Soto,* 35 F.4th at 1000—both triggers for enhancing a sentence.

To be sure, legal determinations may be required to determine whether particular conduct qualifies under the statutory definitions of predicate acts. But "the legal analysis leads to the determination *of a fact*: [the petitioner's] conviction . . . either was, or was not, a conviction for a predicate offense." *Allen*, 976 F.3d at 867 (Fletcher, J., concurring in the denial of the petition for rehearing en banc) (emphasis added). And if the prior conviction "was not a conviction for a predicate offense, [the petitioner] is 'actually innocent' of his increased mandatory sentence." *Id.*

Bousley never said one word about sentence enhancement errors, much less that they are "legal innocence" claims. To the contrary, *Bousley* distinguished "factual innocence" from "mere legal insufficiency." 523 U.S. at 623. "Legal insufficiency" relates to whether the record evidence was sufficient to convict the defendant for the predicate offense, not whether that offense satisfied Congress's definition of the type of crime needed to enhance the sentence. *Id.* at 624; *Hubbard v. Rewerts*, 98 F.4th 736, 743 (6th Cir. 2024) (explaining that *Bousley* "means that a petitioner may not pass through the equitable gateway by simply undermining the state's case.").

The Ninth Circuit's decision in *Allen* illustrates the difference. There, the petitioner "did not allege 'mere legal insufficiency' in the sense used by *Bousley*. The issue was not the legal sufficiency of the evidence to support [the petitioner's] guilt in the state-law marijuana case" that was the predicate for his sentence enhancement. *Allen*, 976 F.3d at 866 (Fletcher, J., concurring in the denial of the petition for rehearing en banc). "The issue,

rather, was whether in that case [the petitioner] had been convicted of a 'controlled substance offense' within the meaning of the then-mandatory Guidelines . . . . Under *Bousley,* this is a claim of actual innocence of the mandatory increase in his federal sentence." *Id.* The *Allen* petitioner "did not claim 'actual innocence' of his sentence because of 'legal insufficiency' of the evidence in the record. He claimed 'actual innocence' because a predicate for his mandatory increased sentence—the existence of a prior conviction of a predicate crime—was missing." *Id.*

That is precisely the case here. Petitioner is not challenging the sufficiency of the evidence of his underlying conviction or of his prior state law offenses that served as the predicate convictions for his sentence. Rather, he is claiming actual innocence because predicates for his mandatory minimum sentence—the existence of prior convictions for "serious drug offenses"—is missing. Yet he will be imprisoned for at least five more years than he could have been sentenced under the maximum of his non-enhanced offense. As the Seventh Circuit acknowledged, "Lairy is serving additional time in prison that no one disputes would be improper if he were sentenced today." Pet. App. 18a. That is exactly the type of miscarriage that the actual innocence exception is meant to prevent.

Cases founded on erroneous strike counting are the *quintessential* actual innocence cases. Unlike some other claims of actual innocence, in these cases the criminal defendant can often prove to a moral certainty that they are ineligible for the mandatory minimum sentence they received. Actual innocence petitions in strike-counting cases, moreover, are the least burdensome of all post-conviction filings, because "courts of first instance" can assess immediately whether a petitioner in a strike-counting case has made a "colorable showing of innocence." Friendly, J., *supra*, at 150. Eliminating the

actual innocence gateway in strike-counting cases extinguishes one of the most clear-cut and important categories of cases in which the actual innocence gateway applies.

III. The Question Presented Is Recurring and Important

The applicability and scope of the actual innocence exception to noncapital sentencing errors are recurring and important questions that warrant this Court's review. *See* Sup. Ct. R. 10(c).

A. The issues here are unquestionably recurring, as reflected by the numerous decisions in the circuit splits. *See supra* Part I. At the same time, recognizing the exception in the context here "would by no means serve to open the floodgates to habeas courts" given that sentence enhancement errors represent a discrete type of error. Mattingly, *supra*, at 545.

B. The issues here are of paramount importance. As this Court put it 45 years ago, a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." *Whalen v. United States*, 445 U.S. 684, 690 (1980). Here, under the ACCA, Congress authorized an enhanced sentence only if a person possesses a firearm after three or more convictions for a "serious drug offense" or a "violent felony," 18 U.S.C. § 924(e)(1). Petitioner is undisputedly serving more time in prison than Congress authorized under the ACCA. Pet. App. 18a.

The actual innocence exception "seek[s] 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. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations." *McQuiggin*, 569 U.S. at 393

(internal citation omitted). "Whether a person is incarcerated for a crime that she did not commit, or is imprisoned for a longer period of time based on a crime that she did not commit, the result is the same—she is wrongfully sentenced and unconstitutionally incarcerated . . . . We should abandon the illusion that there are varying degrees of injustice when it comes to wrongfully imposed sentences." Travis S. Hinman, Comment. *Varying Degrees of Innocence? Expanding the* McQuiggin *Exception to Noncapital Sentencing Errors*, 94 N.C. L. Rev. 991, 1033-34 (2016).

Incarcerating individuals beyond the period authorized by Congress is not only an injustice to the defendant, but also hurts the public given the substantial "annual cost to taxpayers [in] keeping people in prison who should no longer be there." *Id.* at 1029 (citation omitted).

This gateway protection is all the more important where the government regularly seeks to imprison individuals beyond the ordinary maximum sentence under notoriously complex sentence-enhancement laws like the ACCA. Between 2010 and 2019, the sentences of nearly 4,500 defendants were enhanced under the ACCA. *See* U.S. Sentencing Commission, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, 19 (Mar. 2021). In FY 2019, defendants sentenced under the ACCA received an *average* sentence of 206 months, *id.* at 6—more than seven years longer than the then-maximum sentence a defendant could receive for a § 922(g) violation alone. *See* 18 U.S.C. § 924(a)(2).

C. This case presents an ideal vehicle to finally resolve the longstanding conflicts. And this is a rare petition on the question despite the entrenched splits and confusion in the lower courts, likely because habeas petitioners do not have a right to appointed counsel and face significant hurdles in raising these errors on their

own. Petitioner here had counsel at the habeas stage and in this Court.

The Seventh Circuit clearly passed on the questions. And it recognized that "Lairy is serving additional time in prison that no one disputes would be improper if he were sentenced today," Pet. App. 18a, so the case presents a situation where the actual innocence exception—had it applied—could indisputably provide a gateway to correct a grievous sentencing error.

Everyone agrees that petitioner will serve more time in prison than the time Congress authorized for his crimes. He is actually innocent of his sentence, and the actual innocence exception should apply.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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