No. 25-821

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

REPLY BRIEF FOR THE PETITIONER

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This case has changed dramatically since the petition for certiorari was filed four months ago. In its brief in opposition, the Government announced a national policy that when a habeas petitioner is legally ineligible for a noncapital enhanced sentence above the otherwise-applicable statutory maximum, that legal ineligibility is "at least a policy-based reason" for excusing the prisoner's noncompliance with a procedural bar or statutory time limit. Opp. 5-6. In such cases, the Government says, it waives the procedural bar. Opp. 6.

The significance of that announcement is difficult to overstate. The Government's policy has already resulted in Mr. Lairy's release.[1] And if the Government's new policy is actually applied nationwide, it could result in relief for many more federal prisoners who are serving sentences that the law did not authorize because they

[1] Mr. Lairy was released from prison on Wednesday, April 29, 2026. Final Judgment, No. 3:20-cv-00144 (S.D. Ind.), Dkt. 60 (vacating guilty plea and sentence). Mr. Lairy's release would have come years sooner had the Government adhered to its national policy.

were wrongly deemed eligible for mandatory or enhanced punishment. Those sentences range from relatively short term-of-years sentences to life without the possibility of parole.

Notwithstanding the Government's welcome decision to waive its defenses in this case, the Court should decline the Government's invitation to deny the petition. Unless the decision below is vacated, the published law of the Seventh Circuit will continue to foreclose relief for prisoners who are actually innocent of unlawful sentence enhancements whenever the Government invokes, or simply fails to waive, a procedural bar. If the Court concludes that Mr. Lairy's release makes plenary review unnecessary or unavailable, it should grant the petition, vacate the judgment below, and remand with instructions to dismiss the appeal as moot.

A. The Government's national policy underscores that petitioner is correct—this Court's precedents support the application of the actual innocence exception to cases like this one. As set forth in the petition, *Sawyer v. Whitley*, 505 U.S. 333 (1992), applied the actual innocence exception to capital sentencing errors and there is no good reason it should not be applied to noncapital sentencing errors. Nor is there a sound basis for distinguishing between "factual" and "legal" innocence. Innocence is innocence. The Government does not challenge the merits. To the contrary, it said its policy is "*at least*" rooted in policy considerations. Opp. 5-6 (emphasis added). Indeed, the only basis the Government identified—other than its waiver of the statute of limitations under its policy—as a reason to deny review was that the decision below is "interlocutory," Opp. 5, which of course the Government itself has recognized does not preclude review, *cf.* U.S. Pet. Reply 7, *United States v. Philip Morris USA, Inc.*, 546 U.S. 960 (2005) (No. 05-92) ("[T]his Court frequently grants review of

interlocutory court of appeals decisions that would qualify for review except for their non-final posture.").

B. The Government's policy does not eliminate the need for action by this Court. The Government characterizes its policy as preexisting, but the policy was news to petitioner, news to his counsel, and—judging from recent cases—will be news to federal prosecutors litigating § 2255 cases around the country. In several cases decided in just the past few months, the Government has asserted procedural-bar defenses that it should have waived pursuant to its policy. *See, e.g.*, *Epps v. United States*, No. 1:15-CR-120, 2025 WL 2978532, at *5 (E.D. Tenn. Oct. 17, 2025); *Bass v. United States*, No. 23 C 330, 2025 WL 2830195, at *4 (N.D. Ill. Oct. 6, 2025). The policy appears nowhere in any regulation, manual, or public guidance identified by the Government. Without some word from this Court or a Member of this Court, we can expect more of the same. Had the Government followed its policy from the outset, Mr. Lairy would not have spent years litigating to overcome a procedural bar to a sentence that everyone now agrees the law did not authorize.

The Court likely has the power under Article III to grant plenary review and decide this case. *Cf. Honig v. Doe*, 484 U.S. 305 (1988) (Rehnquist, C.J., concurring). But even if the Court determines that the Government's belated action here insulates the issue from review in this case, something should be said by the Court or a Member of the Court about this issue. Many prisoners could benefit from the actual innocence policy announced in this case. Pro se prisoners do not read briefs in opposition, but they do read opinions in the U.S. Reports, including separate opinions by individual Justices. To make the Government's policy more than a parchment promise, an action that elevates the profile of the Government's concession is warranted.

C. At the very least, the Court should vacate the Seventh Circuit's decision. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur is especially appropriate in this case, in light of the "legal consequences" the Seventh Circuit's decision has "spawn[ed]." *Munsingwear*, 340 U.S. at 41. After all, in the Seventh Circuit, if the Government declines, or through another "oversight," Opp. 6, fails to apply its policy, the habeas petitioner will lose. *E.g.*, *Bass*, 2025 WL 2830195, at *5 (applying decision below to hold a habeas petitioner, who challenged his illegal sentence, could not use the actual innocence exception to overcome the Government's statute of limitations defense).

CONCLUSION

The Court should at minimum grant certiorari, vacate the judgment of the court of appeals, and remand with instructions to dismiss the appeal as moot.

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