

No. 25-936

IN THE
Supreme Court of the United States

NADARIUS BARNES,
Petitioner,

v.

UNITED STATES,
Respondent.

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

**BRIEF AMICUS CURIAE OF THE
DUKE CENTER FOR CRIMINAL JUSTICE AND
PROFESSIONAL RESPONSIBILITY
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether, by entering a guilty plea, a defendant waives his right to appeal his conviction on the ground that the admitted conduct does not constitute a criminal offense as a matter of law.

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INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae is the Duke Center for Criminal Justice and Professional Responsibility (CCJPR). CCJPR promotes justice in criminal cases and works to identify, remedy, and prevent the wrongful conviction of innocent people.

Established in 2006, CCJPR was co-founded and led by James E. Coleman, Jr., the John S. Bradway Distinguished Professor of the Practice of Law at Duke University School of Law. For his lifelong commitment to equal justice, due process, and the rule of law, the Bolch Judicial Institute at Duke University School of Law awarded Professor Coleman the 2022 Raphael Lemkin Rule of Law Guardian Medal.

CCJPR promotes justice in criminal cases and trains students, lawyers, prosecutors, judges, and the public to prevent, identify, and remedy wrongful convictions. In addition to public advocacy, clinical faculty and over 300 Duke Law students, through the Wrongful Convictions Clinic and the Duke Law Innocence Project®, have worked to secure the full exoneration of eleven men and the release of five others.

The Center has substantial experience with post-conviction litigation and the structural barriers that arise when legal claims are foreclosed from direct appeal. When purely legal challenges to the scope of

¹ Pursuant to this Court's Rule 37.2, Counsel of record for all listed parties received email notice of the Amicus Curiae's intention to file this brief at least ten days prior to the Brief's due date.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief.

criminal statutes are barred following guilty pleas, those claims are relegated to collateral proceedings, where review is narrower, delayed or unavailable. The Center's experience underscores the substantial systemic consequences of restricting appellate review in this context.

The question presented in this case concerns whether solely, on account of his unconditional guilty plea, a defendant waives review of a claim that his admitted conduct does not constitute a criminal offense. The Court's resolution of that question will directly affect the ability of courts at the earliest stage to correct wrongful convictions of defendants claiming actual innocence. Consequently, this will help lessen the impact on the limited resources of organizations like CCJPR to advance the rule of law by correcting miscarriages of justice through post-conviction proceedings.

SUMMARY OF THE ARGUMENT

An unconditional guilty plea does not waive a defendant's right to argue on direct appeal that his admitted conduct does not constitute a criminal offense as a matter of law. A guilty plea admits facts. It does not concede that the government has lawful authority to convict or punish on those facts. When a defendant argues that the statute does not reach his conduct, he does not just dispute factual guilt, he disputes the legal basis for the conviction itself.

That distinction is settled by this Court's cases. Claims challenging case-specific defects in the determination of factual guilt fall away with a plea. But claims challenging the government's power to convict do not. A defendant who contends that the admitted conduct is not criminal raises a claim of innocence, not a waived procedural claim. The contrary rule collapses

the distinction between fact and law and allows a conviction to stand even where the statute does not criminalize the conduct at issue.

The courts of appeals are divided on this question. Some treat a plea as resolving both factual and legal sufficiency. Others recognize that a plea settles only the facts and leaves intact the legal question of whether those facts amount to a crime. That disagreement produces intolerable asymmetry in federal criminal law. The availability of review should not depend on geography.

The alternatives to direct appeal are no substitute. Once a defendant is barred from pursuing this claim on direct review because of his plea, collateral review may not provide an alternative path. A defendant generally may not use post-conviction proceedings as a substitute for appeal, and a claim not heard on direct review may be treated as procedurally defaulted. The traditional gateways do not solve the problem. It is uncertain whether a court's refusal to hear the claim because of a guilty plea establishes cause. And courts have held that the actual innocence gateway is limited to factual innocence, not innocence resulting from the government's failure to establish a statutory element for enhancement.

That leaves a structural gap. A defendant who preserved the issue may lose both direct and collateral review entirely. That result turns diligence into forfeiture and deprives courts of the opportunity to correct legal error at the stage where correction is expected to occur.

That problem is especially serious in a criminal justice system characterized by guilty pleas. Nearly all federal convictions result from pleas, not trials. In that

system, a rule conditioning review on the willingness to go to trial may prevent substantial legal questions from being heard at all in some cases. It will also distort plea bargaining by forcing defendants to reject otherwise appropriate pleas to preserve legal claims that have nothing to do with disputed facts.

Direct appeal is the proper vehicle for resolving those claims. It allows courts to address pure questions of law promptly, uniformly, and in cases where the relevant facts are undisputed. This Court should resolve whether an unconditional guilty plea alone waives a defendant's right to argue on direct appeal that his admitted conduct does not constitute a crime.

REASONS FOR GRANTING THE WRIT

I. COURTS OF APPEALS ARE SPLIT ON WHETHER AN UNCONDITIONAL GUILTY PLEA IMPLICITLY WAIVES DIRECT REVIEW OF A PRESERVED CLAIM THAT THE GOVERNMENT LACKED STATUTORY AUTHORITY TO CONVICT THE DEFENDANT.

The courts of appeals are sharply divided over the effect of an unconditional guilty plea on a defendant's right to appellate review of a preserved claim of law based on his actual innocence. Some circuits hold that a plea bars a defendant from arguing on direct appeal that the conduct he admitted does not constitute a criminal offense. *See, e.g., United States v. Pittman*, 125 F.4th 527, 530–33 (4th Cir. 2025); *Grzegorzcyk v. United States*, 997 F.3d 743, 745–48 (7th Cir. 2021); *United States v. Rubin*, 743 F.3d 31, 38–40 (2d Cir. 2014); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1340–41 (D.C. Cir. 2004). Other circuits hold that such claims survive a plea because they challenge the

government's statutory authority to obtain the conviction itself. *See, e.g., United States v. Jones*, 75 F.4th 502, 508 (5th Cir. 2023); *United States v. St. Hubert*, 909 F.3d 335, 343–45 (11th Cir. 2018), abrogated on other grounds by *United States v. Taylor*, 596 U.S. 845 (2022); *United States v. Brown*, 875 F.3d 1235, 1238–39 (9th Cir. 2017); *United States v. Rosa-Ortiz*, 348 F.3d 33, 36–37 (1st Cir. 2003).

This disagreement reflects fundamentally different views of the legal consequences of a guilty plea. In the first set of circuits, the plea is treated as conceding both the underlying conduct and the legal sufficiency of the conduct to establish the offense to which the plea is entered. In the second, the plea resolves only the historical facts constituting the conduct, preserving purely legal questions of whether those facts satisfy the Government's burden to establish beyond a reasonable doubt the elements of the statute under which the defendant was charged. The result is a persistent conflict over whether defendants who plead guilty may later challenge the legal validity of the conviction itself, and if so, how such a challenge can be mounted.

Because convictions are overwhelmingly obtained through guilty pleas, the conflict over whether a plea forecloses review of claims that the admitted conduct is not criminal (and therefore that the defendant is innocent of the enhancement) is crucial. *See Bousley v. United States*, 523 U.S. 614, 629 (1998) (Stevens, J., dissenting in part). The availability of appellate review now turns on geography rather than law. Identical legal claims are treated fundamentally different, depending solely on the circuit in which the prosecution occurs.

A. The courts of appeals' split on whether an unconditional plea waives direct review of claims of innocence creates unnecessary legal uncertainty for criminal defendants.

Courts adopting the court-imposed waiver rule treat a guilty plea as admitting not only the charged conduct but also settling the legal issue whether the conduct establishes the elements of the offense. Under that view, once a defendant pleads guilty, he may not subsequently claim on appeal that the admitted conduct did not violate the statute under which he was convicted. *See Pittman*, 125 F.4th at 530–33; *Grzegorzczuk*, 997 F.3d at 745–48; *Rubin*, 743 F.3d at 38–40; *Delgado-Garcia*, 374 F.3d at 1340–41. Because the plea is treated as conceding the legal validity of the charge, those courts regard any contrary argument as waived.

Other circuits reject that premise. Those courts recognize that a defendant may admit the conduct alleged in the indictment in a guilty plea, while maintaining that the conduct does not constitute a crime under the statute. *See United States v. Jones*, 75 F.4th at 508; *St. Hubert*, 909 F.3d at 343–45; *Brown*, 875 F.3d at 1238–39; *Rosa-Ortiz*, 348 F.3d at 36–37. In their view, a guilty plea resolves factual disputes but does not conclusively determine the legal reach of the statute under which the conviction is entered. *See Jones*, 75 F.4th at 508; *St. Hubert*, 909 F.3d at 343–45; *Brown*, 875 F.3d at 1238–39; *Rosa-Ortiz*, 348 F.3d at 36–37.

This divergence is not procedural but substantive. One approach treats the plea as resolving both fact and law; the other confines the plea's effect to resolving the facts but preserving for appellate review the merits of claims that the admitted conduct does not

establish the statutory elements of the offense. *See In re Winship*, 397 U.S. 358, 364 (1970). That disagreement produces substantial uncertainty for criminal defendants and inconsistent interpretations of federal criminal statutes across jurisdictions.

B. In circuits treating an unconditional plea as a waiver of challenges that the statute does not criminalize the admitted conduct, a defendant who defaulted on that claim prior to his guilty plea may be able to pursue it collaterally under the *Menna-Blackledge* doctrine.

The waiver rule adopted in some circuits conflicts with this Court’s decisions regarding review of guilty-pleas. Those decisions distinguish between claims challenging procedural defects in the adjudicative process and claims challenging the government’s authority to obtain the conviction itself. *Class v. United States*, 583 U.S. 174, 180–83 (2018); *Fiore v. White*, 531 U.S. 225, 228–29 (2001); *Bousley v. United States*, 523 U.S. 614, 620–22 (1998); *United States v. Broce*, 488 U.S. 563, 574–75 (1989); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975); *Blackledge v. Perry*, 417 U.S. 21, 30 (1974).

Menna articulates that principle directly: a guilty plea “is an admission of factual guilt,” but does not bar a claim that the state may not convict “no matter how validly his factual guilt is established.” 423 U.S. at 62 n.2. *Blackledge* rests on the same premise. There, the plea did not foreclose review because the challenge went “to the very power of the State” to prosecute the charge at issue. 417 U.S. at 30. These decisions define the boundary of the guilty-plea rule itself.

A plea waives claims concerning antecedent procedural errors. It does not relieve the government of its constitutional burden to show that the facts establish the elements of the statute under which the defendant was charged. *See Class*, 583 U.S. at 180–83 (holding that a guilty plea does not bar a defendant from arguing on direct appeal that the statute of conviction is unconstitutional). Such a claim survives because it does not challenge the plea’s factual admissions but only whether the government has criminalized the admitted conduct. *Id.* at 182; *accord, Fiore*, 531 U.S. at 228–29; *Bousley*, 523 U.S. at 620–22; *Broce*, 488 U.S. at 574–75. These decisions rest upon the fundamental principle that the government cannot punish conduct—the sole purpose of 18 U.S.C. § 924(c)—that the statute itself does not criminalize.

1. A guilty plea admits historical facts but does not concede the government’s authority to prosecute based on the admitted facts.

A guilty plea establishes the historical conduct underlying the conviction. It does not determine the legal consequences of those facts. That distinction runs throughout this Court’s guilty-plea jurisprudence.

Menna made the point explicitly. The plea admitted factual guilt but did not waive the claim that the State lacked authority to convict based on the admitted facts. 423 U.S. at 62 n.2. *Blackledge* reached the same conclusion, holding that the asserted defect concerned the State’s authority to prosecute the charge rather than the factual basis for conviction. 417 U.S. at 30–31. *Class* reaffirmed that principle in the modern context. There, the Court treated the plea as an admission of conduct only, leaving open whether the

government had authority to punish the defendant for the conduct. 583 U.S. at 181–83.

Broce is consistent with that rule. The Court rejected a challenge that sought to contradict the factual admissions underlying the plea. 488 U.S. at 570–74. But it recognized claims that the court lacked authority to enter the judgment. *Id.* at 575. In other words, a guilty plea resolves disputes about what the defendant did; it does not conclusively establish that the legislature criminalized what he did.

2. Claims that admitted conduct does not constitute a criminal offense are claims of innocence.

A claim that admitted conduct does not constitute the charged offense is a claim of innocence. *See Bousley*, 523 U.S. at 620–22. The defendant does not dispute what occurred; he disputes whether the legislature made the conduct a crime. Such claims differ fundamentally from the procedural objections ordinarily waived by a guilty plea. Challenges to searches, confessions, or evidentiary rulings concern the procedures through which factual guilt was established. A claim that the statute does not criminalize the admitted conduct concerns whether the defendant has committed an offense at all. *Id.* at 620–22. That is a claim of “actual innocence” because the defendant has been convicted for conduct that the law does not criminalize. *Id.* at 623. *See also Fiore*, 531 U.S. at 228–29.

3. This Court's precedents recognize that such claims of innocence survive a guilty plea and may be pursued in post-conviction proceedings.

This Court's decisions recognize that a claim challenging the government's authority to convict a defendant for undisputed conduct survives a guilty plea. *Menna* and *Blackledge* establish the rule. *Broce* preserves it in defining the limits of a plea-based waiver. *Bousley* and *Fiore* apply the same principle where subsequent interpretation of a statute reveals that the defendant's conduct was not criminal. *Class* confirms that the doctrine applies on direct appeal following an unconditional guilty plea.

Taken together, these cases reflect a consistent principle: a guilty plea admits facts, not law, and it does not legalize a conviction that substantive criminal law does not authorize. When a defendant concedes the factual basis for his guilty plea but argues that the statute under which he is being sentenced does not criminalize his conduct, the claim challenges the government's statutory authority to impose punishment rather than the procedures through which guilt was established.

The existing circuit split demonstrates the need for this Court's intervention. In some jurisdictions, such claims of actual innocence receive direct appellate review; in others, they are deemed waived by the act of pleading guilty; and in some, but not all, they may survive for collateral review. The resulting chaos leaves the availability of review to the happenstance of geography and prevents uniform resolution of questions regarding the government's authority to obtain substantially enhanced punishment in some cases.

**II. COLLATERAL REVIEW IS NOT A
SUBSTITUTE FOR DIRECT APPEAL IN A
CASE WHERE THE DEFENDANT CHAL-
LENGED THE SENTENCE ENHANCEMENT
PRIOR TO HIS UNCONDITIONAL
GUILTY PLEA BUT WAS BARRED FROM
PURSUING IT ON DIRECT APPEAL
BECAUSE OF HIS PLEA.**

Under the Federal Rules of Criminal Procedure, a guilty plea may only be set aside on direct appeal or collateral attack. Fed. R. Crim. P. 11(e). In circuits that foreclose direct appeal under the waiver by guilty-plea rule, collateral review becomes the only avenue to challenge a guilty plea that was not challenged on direct appeal. *Bousley*, 523 U.S. at 622. However, before the claim can be considered on the merits, the defendant must first obtain relief from the procedural default resulting from his failure to pursue it on direct appeal. Such relief is available only upon a showing of cause and prejudice or through the actual innocence gateway. See *Bousley*, 523 U.S. at 622; *United States v. Frady*, 456 U.S. 152, 166–68 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

For a defendant such as the petitioner, however, who raised his claim in district court, but was not allowed to pursue it on direct appeal as a result of his guilty plea, neither avenue for collateral review may be available; his defaulted claim may be permanently barred. This structural gap warrants the Court's consideration.

A. The Tenth Circuit's guilty-plea waiver rule may preclude review of a claim otherwise allowed by this Court on both direct and collateral review.

Under this Court's decisions, a defendant may challenge a guilty plea on direct appeal, *Menna*, 423 U.S. at 62 n.2; *Blackledge*, 417 U.S. at 30, or in collateral proceedings. *Bousley*, 523 U.S. at 622. For a defendant like Barnes, however, who was denied direct review of his challenge to the Government's authority to obtain a sentence enhancement as a consequence of his guilty plea, collateral review may not restore that lost opportunity. A defendant cannot use 28 U.S.C. § 2255 as a substitute for an appeal that was determined to be waived by the circuit court, *see Frady*, 456 U.S. at 165, nor can he relitigate the technically defaulted claim absent a showing of cause and prejudice or obtaining relief through the actual innocence gateway. *Bousley*, 523 U.S. at 622. Neither avenue is clearly available.

B. The failure to raise an available claim on direct appeal as a result of a guilty plea waiver may constitute a procedural default.

If a defendant does not raise a claim on direct appeal that was available for review, it technically constitutes a procedural default that requires a showing of cause and prejudice to obtain relief from the default or relief from the miscarriage of justice through the innocence gateway. *Id.* Barnes raised, litigated, and lost his challenge to the § 924(c) sentence enhancement in district court and tried to pursue it on direct appeal. An unintended and involuntary consequence of the Tenth Circuit's refusal to review the § 924(c) claim

because of his guilty plea, however, may also be a bar to of his right to seek collateral review of the challenge.

1. The cause-and-prejudice standard may not offer a pathway for a claim that was preserved but not heard on direct appeal.

Cause and prejudice must be satisfied for review of a defaulted claim on collateral review. *See Sykes*, 433 U.S. at 97; *Frady*, 456 U.S. at 167–68 (extending the standard to a § 2255 motion). It is not obvious that the waiver of direct appeal occasioned by a guilty plea is an “objective factor external to the defense” that impeded the defendant’s direct appeal. *Murray v. Carrier*, 477 U.S. 478, 486, 488 (1986). Though, a court-created barrier to appellate review could support a finding of cause, that issue has yet to be decided.² Thus, it is uncertain whether the Tenth Circuit’s refusal to hear Barnes’s preserved claim as a result of his guilty plea would constitute cause under *Sykes* and its progeny.³ *See Coleman v. Thompson*, 501 U.S. 722, 750–51 (1991) (recognizing that procedural rules serve the interest of finality even when they prevent review of constitutional claims); *Carrier*, 477 U.S. at 487.

² See Charles E. Hintz, *The Plain Error of Cause and Prejudice*, 53 Seton Hall L. Rev. 439, 463–64 (2022) (stating that cause and prejudice is an imprecise standard that is often more complicated and time-consuming than the merits of the underlying claim).

³ The defendant likely cannot claim his guilty plea was not voluntary and intelligent because he challenged whether § 924(c) criminalizes his conduct before his unconditional guilty plea. *Broce*, 488 U.S. at 569.

2. The actual innocence gateway may be unavailable to obtain collateral review of a defaulted claim challenging a guilty plea under 18 U.S.C. §924(c).

The actual innocence gateway, as applied to challenges of a sentence enhancement such as § 924(c), is limited. It is unclear whether it can be used to provide relief based on what some courts have called “legal innocence.” Those courts require proof that the defendant is innocent of the predicate offense, and not just that the admitted conduct did not establish the statutory elements for the enhancement. *Damon v. United States*, 732 U.S. F.3d 1, 5–6 (1st Cir. 2013).

That distinction likely would control here. Barnes challenges whether § 924(c) applies to his admitted conduct. His claim that § 924(c) does not authorize a sentence enhancement for that conduct may not provide relief through the actual innocence gateway.⁴

C. The resulting structural gap should be eliminated by this Court to preserve the integrity of the plea system.

The resulting conflict creates a structural mismatch. A defendant who fails to raise the claim at all may obtain collateral review but a defendant who raises

⁴ *Damon*, 732 F.3d at 5–6; *see also* *Marrero v. Ives*, 682 F.3d 1190, 1193 (9th Cir. 2012) (explaining one cannot assert a cognizable claim of actual innocence for a sentence enhancement); *McKay v. United States*, 657 F.3d 1190, 1189-90 (11th Cir. 2011) (stating that for *Bousley* to apply, a movant must show that he is factually innocent of the predicate crime); *United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010) (explaining that innocence stems from “factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes”).

and preserves the claim, and is denied direct appeal as a consequence of his guilty plea, may be precluded from obtaining review through either path. The more diligent the defendant is in preserving his claim prior to his guilty plea, the less likely his claim will receive appellate scrutiny. This conflicts with the repeated suggestion that procedural rules are designed to ensure that the trial and direct appeal remain “the main event” and not a “tryout on the road” for later collateral review. *See Sykes*, 433 U.S. at 90 (Burger, C.J., concurring). The Tenth Circuit shut down the main event before it could run its course.

III. THE QUESTION PRESENTED IS SYSTEMATICALLY IMPORTANT IN A CRIMINAL JUSTICE SYSTEM DOMINATED BY GUILTY PLEAS.

The rule adopted in some circuits operates in a criminal justice system in which convictions are overwhelmingly obtained through guilty pleas. In federal court, approximately ninety-seven percent of convictions result from guilty pleas. *See* United States Sentencing Commission, 2024 Sourcebook of Federal Sentencing Statistics, tbl. 11. In that system, rules governing the effect of a guilty plea control how and whether recurring legal questions are reviewed by appellate courts.

A. Guilty pleas resolve the overwhelming majority of criminal cases.

Guilty pleas define the system. This Court has recognized that “ours is for the most part a system of pleas, not a system of trials.” *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)). Because nearly all convictions result from guilty pleas, the consequences attached to those pleas

determine which and how legal questions are presented for appellate review. If review depends on trial, the set of cases capable of generating appellate decisions becomes vanishingly small.

B. A significant number of defendants plead guilty in such a system for reasons unrelated to the legal validity of their convictions.

Defendants often plead guilty because the cost of going to trial is too high. A defendant who proceeds to trial faces both conviction and, relative to a negotiated plea agreement, a significantly higher sentence. *See Brady v. United States*, 397 U.S. 742, 752–53 (1970). Faced with that risk, defendants accept plea agreements even when they are innocent or maintain that their conduct does not violate the statute of conviction.⁵

This dynamic has real consequences. James Lee Woodward, for example, was offered a three-year plea in a homicide case he denied committing. He rejected the plea and received a life sentence after trial, ultimately spending twenty-seven years in prison before being exonerated. *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions*

⁵ *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 163 (2011) (stating “[t]here’s no greater injustice than a man found guilty of something that he didn’t do. Nothing is more horrifying, in our system of justice.”); The National Registry of Exonerations, *Explore Exonerations*, https://exonerationregistry.org/cases?f%5B0%5D=n_cchar%3AP&f%5B1%5D=n_pre_1989%3A0 (last visited Mar. 22, 2026) (stating that since 1989, the twenty-four percent of exonerees who plead guilty lost a combined total of 2,712 years of freedom).

Go Wrong, 151–52 (2011). That result reflects the grave consequence of conditioning justice on risk.

When those defendants later challenge their convictions, they must proceed through post-conviction proceedings that are slower, narrower, and rarely successful. Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts*, NCJ No. 305999, at 64, tbl. 15 (2007). Those proceedings are not suited to resolve pure questions of statutory interpretation. Direct appeal often will be the most efficient and meaningful opportunity to obtain review of such preserved legal claims.

C. Conditioning appellate review on proceeding to trial distorts the plea system.

A defendant who cannot obtain review of a non-frivolous legal issue after a guilty plea must choose between trial to obtain such review or a plea that may bar review. That choice does not turn on the merits. It turns on the defendant's willingness to risk a substantially greater sentence by going to trial. *See Lafler*, 566 U.S. at 170.

The result is predictable. Defendants must reject otherwise appropriate pleas to preserve legal claims even where there is no factual dispute that warrants a trial, while courts must expend resources on trials that serve no factfinding purpose. And conditional pleas do not solve the problem because the government may withhold consent. *See* Fed. R. Crim. P. 11(a)(2). In a system defined by guilty pleas, conditioning review on trial ensures that many meritorious claims may never be reviewed or may be decided only years later when a case arises in the right circuit.

D. The waiver rule challenged in this petition prevents the uniform development of federal criminal law.

These consequences affect the pace at which federal criminal law develops. Questions concerning the scope of federal criminal statutes require consistent answers, and appellate courts ordinarily resolve those questions on direct review. The waiver rule removes them from that process in many of the cases in which they often arise. That delays resolution of claims until a post-conviction challenge can be mounted or until the same issue arises in a circuit in which it can be reviewed on direct appeal.

The result is that identical legal claims are reviewed in some circuits and foreclosed in others. This process may delay this Court from reaching an important issue on direct review. The development of federal criminal law thus turns not on the importance of the question, but on geography, prosecutorial discretion, and a defendant's willingness to risk an unnecessary trial. This case presents a clean vehicle to resolve that problem by putting all circuits on the same footing.

CONCLUSION

For the reasons stated above, the Petition for the Writ of Certiorari should be granted.

Respectfully Submitted,

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