No. 18-6150

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RYAN COURTADE,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia, Norfolk Division

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The organization is the only nationwide professional bar association for public defenders and private criminal defense lawyers, and is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that, in light of the immense pressures on criminal defendants

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), no party opposes the filing of this brief.

to plead guilty, appeal waiver provisions common in federal plea agreements do not result in the imprisonment of actually innocent individuals without legal recourse.

INTRODUCTION

While the criminal trial is considered the "gold standard of American justice," *Lafler v. Cooper*, 566 U.S. 156, 186 (2012), the reality is that the American criminal justice system is now a system of pleas.

> "[H]orse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

Missouri v. Frye, 566 U.S. 134, 144 (2012) (second alteration in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

As the Supreme Court has observed, "the simple reality" is that plea bargaining has become "central to today's criminal justice system," with 97 percent of federal convictions and 94 percent of state convictions resulting from guilty pleas. *Frye,* 566 U.S. at 134; *see also* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 14 (2018), http://nacdl.org/NACDL-Trial-Penalty-Report/; Ronald F. Wright, *Trial Distortion*

and the End of Innocence in Federal Criminal Justice, 154 U. Pa. L. Rev. 79, 90 (2005) (noting a "sustained climb" in guilty pleas since 1980). And in the operation of that system, it is widely accepted that prosecutors hold overwhelming leverage over defendants, which induces plea bargains. *See* Stephanos Bibas, *Pleas' Progress*, 102 Mich. L. Rev. 1024, 1039 (2004) (discussing issues including overlapping statutes, charging discretion, and vetoing of bench trials); *see also* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 Marq. L. Rev. 213, 242-243 (2007) (discussing the psychological stress the plea process imposes on criminal defendants). The application of the terms of those agreements, including those waiving the right to appeal, thus weighs heavily for defendants writ large.

Guilty plea agreements that include waivers of the right to appeal the "conviction and any sentence within the statutory maximum," as the agreement in this case provides (*see* Br. of Appellant at 11), have become standard issue in many jurisdictions, including in the Eastern District of Virginia. *See, e.g.*, Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122-126 (2015); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 211 (2005). Given the widely acknowledged pressure on criminal defendants to

plead guilty to avoid the specter of lengthy imprisonment, the broad and rigid enforcement of appeal waivers risks insulating convictions for conduct that in fact is not criminal. This all too common occurrence threatens to subvert the fairness and legitimacy of the criminal justice system as a whole. *See* Marc M. Arkin & Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1271 (2012) (discussing the importance of appellate review for ensuring institutional legitimacy and individual dignity); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 577 n.300 (1992) (impinging appellate rights "does not engender a sense of procedural justice").

As criminal defense lawyers who regularly participate in the plea bargaining process and subsequent appeals, amicus supports Courtade's argument that his appeal is not barred by the appeal waiver in his plea agreement because he is not guilty of a crime under 18 U.S.C. § 2252(a)(4)(B). (*See* Br. of Appellant at 49-51.) The Supreme Court has long recognized that a guilty plea only is "an admission of factual guilt," *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam), and consistently held that guilty pleas are not absolute and may be appealed based on claims of actual innocence. *See id*. at 61; *Blackledge v. Perry*, 417 U.S. 21 (1974); *Bousley v. United States*, 523 U.S. 614 (1998); *Class v. United States*, 138 S. Ct. 798, 804 (2018). Because a guilty plea reflects an admission only of factual guilt,

a defendant's challenge to the applicability of the convicting statute to those admitted facts is a claim of actual innocence that cannot be waived.

In *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016), this Court applied the Supreme Court's bedrock principle and held that Adams' claim of actual innocence lies outside the scope of an appeal waiver in a plea agreement. *Id*. at 182. Courtade's claim here is no different from the actual innocence claim in *Adams*, and this Court need not entertain novel arguments or break new ground to reach the merits of Courtade's claim.

Moreover, the need to protect a defendant's ability to seek relief for actual innocence notwithstanding an appeal waiver is reinforced by prudential considerations, including the vastly superior bargaining power the government possesses in the context of plea negotiations, the threat to the integrity of the criminal justice system that arises when that leverage results in convictions not fitting the facts, and the crucial role of judicial scrutiny in rebuffing that threat. Indeed, "[a]lthough its origins are neither constitutional nor ancient, the right [to appeal] has become, in a word, sacrosanct." Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 Yale L.J. 62 (1985) (footnote omitted).

ARGUMENT

I. THE SUPREME COURT HAS LONG HELD THAT GUILTY PLEAS ARE NOT ABSOLUTE, AND PLEA AGREEMENT APPEAL WAIVERS DO NOT FORECLOSE A CLAIM OF ACTUAL INNOCENCE.

A. Guilty Pleas Are Not Absolute Under Longstanding Supreme Court Precedent.

The Supreme Court has long recognized that a guilty plea does not bar a claim of innocence on appeal "if the facts alleged and admitted do not constitute a crime." *Class*, 138 S. Ct. at 804 (quoting *Commonwealth v. Hinds*, 101 Mass. 209, 210 (1869)); *see also Blackledge*, 417 U.S. at 30 (where the claim implicates "the very power of the State" to prosecute the defendant, a guilty plea by itself cannot bar it); *United States v. Broce*, 488 U.S. 563, 569 (1989) (noting that a valid guilty plea does not bar a claim on appeal "where on the face of the record the court had no power to enter the conviction or impose the sentence"). That recognition is based on the nature of a guilty plea: it is "a confession of all the facts charged in the indictment, and also of the evil intent imputed to the defendant," *Class*, 138 S. Ct. at 804 (quoting *Hinds*, 101 Mass. at 210), but it "does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute." *Menna*, 423 U.S. at 62 n.2.

Based on this settled principle, the Supreme Court recently held that a defendant's constitutional challenges to conviction survived despite the express waiver of appeal in his plea agreement. *See Class*, 138 S. Ct. at 798. In *Class*, the defendant pleaded guilty to possession of a firearm on U.S. Capitol grounds pursuant to a plea agreement that included an express waiver of the right to appeal a sentence at or below the judicially-determined, maximum sentencing guideline range. The waiver also applied to most collateral attacks on the conviction and sentence, including challenges under 28 U.S.C. § 2255. *See id*. at 802; *see also* Plea Agreement ¶ 9, *United States v. Class*, No. 1:13-cr-00253-RWR (D.D.C. Nov. 21, 2014), ECF No. 169. After the district court accepted his guilty plea and imposed a sentence, the defendant appealed his conviction and argued that the statute under which he had been convicted was unconstitutional on multiple grounds. *Class*, 138 S. Ct. at 802. The court of appeals dismissed the appeal, holding that Class had waived his constitutional claims by pleading guilty and agreeing to an appeal waiver. *Id*. at 802-03.

The Supreme Court reversed, holding that where a defendant's claim challenges "the Government's power to criminalize [the defendant's] (admitted) conduct," a guilty plea appeal waiver "does not bar a direct appeal." *Id.* at 805. In so holding, the Court distinguished Class's viable claim from other categories that

a plea agreement appeal waiver would forbid. First, a guilty plea would foreclose a claim that a defendant can prove only by contradicting "[the] indictments and the existing record." *Id*. at 804 (quoting *Broce*, 488 U.S. at 576). Because Class's constitutional claims did "not contradict the terms of the indictment or the written plea agreement," the Court found those claims could be "resolved without any need to venture beyond that record"; as such, they survived the plea agreement. *Class*, 138 S. Ct. at 804 (quoting *Broce*, 488 U.S. at 575). Second, a guilty plea also would foreclose claims that "focus upon case-related constitutional defects that 'occurred prior to the entry of the guilty plea,'" as a guilty plea makes such claims "irrelevant to the constitutional validity of the conviction." *Class*, 138 S. Ct. at 804-05 (first quoting *Blackledge*, 417 U.S. at 30; and then quoting *Haring v. Prosise*, 462 U.S. 306, 321 (1983)).

In contrast, however, a claim challenging the power of the government to criminalize a defendant's conduct is not made irrelevant by a guilty plea. *Class*, 138 S. Ct. at 805. Because the defendant's claims in *Class* did "not fall within any of the categories of claims that [the defendant's] plea agreement forbids him to raise on direct appeal," the Court held that the defendant could pursue his appeal despite the appeal waiver. *Id*.; *see also United States v. St. Hubert*, 909 F.3d 335, 343 (11th Cir. 2018) ("[A] claim that the facts alleged in the indictment and

admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea . . . ." (citing *Class*, 138 S. Ct. at 805)).

B. This Court Has Extended the Supreme Court's Rule That Guilty Pleas And Appeal Waivers Are Not Absolute to Collateral Attacks Under 28 U.S.C. § 2255.

This Court has extended the Supreme Court's rule that guilty plea appeal waivers do not foreclose all claims on direct appeal to collateral attacks under 28 U.S.C. § 2255.[2] While courts generally enforce a waiver of appeal in a plea agreement "if it is valid and the issue appealed is within the scope of the waiver," *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016), this Court on a collateral attack under Section 2255 will not enforce an otherwise valid waiver "if to do so would result in a miscarriage of justice." *Id*. The miscarriage of justice exception is "grounded in the 'equitable discretion' of habeas courts to see that

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[2] A federal prisoner may file a motion to vacate his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). For a prisoner to "collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, the movant must . . . demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack." *United States v. Mikalajunas*, 186 F.3d 490, 492-93 (4th Cir. 1999). "[I]n order to demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a movant must show actual innocence by clear and convincing evidence." *Id*. at 493.

federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (quoting *McCleskey v. Zant*, 499 U.S. 467, 502 (1991)). For that reason, "a proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice requirement.'" *Adams*, 814 F.3d at 182 (quoting *Wolfe v. Johnson*, 565 F.3d 140, 160 (4th Cir. 2009)). In this Court then, a cognizable claim of actual innocence places a Section 2255 motion squarely outside the scope of an appeal waiver included in a plea agreement. *See id*.[3]

In *Adams*, the defendant pleaded guilty to, among other things, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). 814 F.3d at 180. The plea agreement contained a provision in which Adams waived his right to challenge his conviction or sentence in a motion pursuant to 28 U.S.C. § 2255 unless he did so on the basis of ineffective assistance of counsel or prosecutorial misconduct. *Id*. After his sentence was affirmed on appeal, however, Adams filed a Section 2255 motion to vacate his conviction under Section 922(g). *Id*. at 181. He argued that he was actually innocent of being a felon in possession of a firearm

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[3] While this brief assumes without conceding that Courtade's plea agreement was valid, other grounds exist to allow Courtade's claim to proceed to the extent that this Court finds the plea agreement was invalid. (*See* Br. of Appellant at 51-54.)

because this Court's decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011)—issued subsequent to his pleas—rendered the predicate offenses for his Section 922(g) conviction non-felonies. *Adams*, 814 F.3d at 181. The district court dismissed his Section 2255 motion, concluding that the waiver in the plea agreement barred such a claim. *Id*.

This Court reversed, holding that a defendant's claim of actual innocence is outside the scope of an appeal waiver in a plea agreement. *Id*. at 182. The Court first found that the appeal waiver provision generally was valid, and that a waiver remains valid even if the law subsequently changes. *Id*. Nevertheless, the Court held that a Section 2255 claim based on actual innocence falls outside the scope of a valid waiver of appeal. *Id*. The Court went on to hold that Adams had shown "factual innocence" as required by Supreme Court precedent—and that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," *Bousley*, 523 U.S. at 623 (citation omitted). *Adams*, 814 F.3d at 183. In particular, the Court determined that one of the three required elements for a conviction under Section 922(g) is that the defendant be a felon at the time of committing the offense. In light of this Court's subsequent decision deeming the offenses on which Adams' status as a felon rested to be non-felonies, Adams had shown that it was "impossible" for the government to prove that element based on

the facts admitted in his plea agreement. *Id*. Because Adams was actually innocent of the Section 922(g) offense to which he pleaded guilty, this Court vacated his conviction. *Id*. at 184. As explained below, the same outcome is warranted in cases raising actual innocence claims of the type Courtade raises here.

II. COURTADE MAKES A CLAIM OF ACTUAL INNOCENCE THAT LIES BEYOND THE SCOPE OF THE PLEA AGREEMENT APPEAL WAIVER.

Permitting Courtade to pursue a Section 2255 collateral attack here is consistent with both Supreme Court and this Court's precedents safeguarding a defendant's right to vindicate meritorious actual innocence claims notwithstanding an appeal waiver. Courtade's claim that the admissions in the plea agreement do not constitute the offense for which he was convicted is a claim of actual innocence no less than Adams' claim that he was not guilty of being a felon in possession of a firearm.

The Supreme Court has explained that to establish actual innocence, a petitioner must demonstrate that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623-24 (citation omitted). Moreover, actual innocence means "factual innocence," not merely legal insufficiency of evidence to support a conviction. *Id*. at 623. Under both Supreme Court and Fourth Circuit precedents, Courtade's claim that the

admissions in the plea agreement do not constitute a crime as charged falls squarely within the bounds of an actual innocence claim.

In this Circuit, a claim that the admitted facts do not amount to a violation of the statute of conviction is a claim of actual innocence and, therefore, a basis for disregarding an appeal waiver. Citing the actual innocence standard from *Bousley*, this Court has held that where the undisputed underlying facts do not meet the statutory criteria, an actual innocence claim has been made, which is necessarily outside of the waiver of appeal in the plea agreement. *Adams*, 814 F.3d at 178. As set forth above, the defendant in *Adams* argued that he was actually innocent of being a felon in possession of a firearm because this Court's subsequent decision rendered the predicate offenses for his Section 922(g) conviction non-felonies. In essence, the defendant was arguing that the facts to which he pleaded guilty did not ultimately constitute a crime under the statute.

This Court's approach also firmly aligns with cases outside this Circuit in which courts have permitted relief from appeal waivers where the admitted facts did not satisfy the statutory offense. For example, in *United States v. Peter*, the defendant pleaded guilty to a RICO conspiracy predicated on mail fraud and admitted to making misrepresentations on applications for alcohol licenses that he mailed to state authorities. 310 F.3d 709, 711 (11th Cir. 2002). In *Cleveland v.*

United States, however, the Supreme Court held that the offense of mail fraud requires that property be in the hands of the victim and that state and municipal licenses do not rank as "property" in the hands of the official licensor for purposes of the mail fraud statute. 531 U.S. 12, 15 (2000). Because Peter's indictment alleged that the property in the victim's hand was a state license, the conduct to which Peter pleaded guilty did not constitute mail fraud under *Cleveland*. *Peter*, 310 F.3d at 714-16. The Eleventh Circuit permitted Peter's challenge to his plea because "the Government affirmatively alleged a specific course of conduct that is outside the reach of the mail fraud statute [and] Peter's innocence of the charged offense appears from the very allegations made." *Id.* at 715.

Similarly apt is *United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003). There the defendant pleaded guilty to violating the Federal Escape Act, which criminalizes escape and attempted escape by persons who are in federal custody under specified conditions, including those in custody "by virtue of an arrest on a charge of felony, or conviction of any offense." *Id.* at 34-35 (citation omitted). The defendant raised a jurisdictional challenge to the indictment, arguing that his co-defendant, who he helped escape from prison, was not in federal custody "by virtue of an arrest on a charge of felony, or conviction of any offense," as required by the Federal Escape Act because he was in detention on a federal material

witness warrant. *Id.* at 35 (citation omitted). The First Circuit interpreted the Federal Escape Act and determined that the defendant's conduct admitted in the plea agreement was not a crime under the statute. Accordingly, the court permitted his appeal despite an appeal waiver. *Id.*

As these cases demonstrate, a defendant's claim that the charging statute does not proscribe the conduct to which he pleaded guilty is a claim of actual innocence. Courtade presses precisely such a claim: he argues that the admissions in his plea agreement, *i.e.* possession of a video depicting certain activity, does not constitute a crime under 18 U.S.C. § 2252(a)(4)(B), which prohibits depictions of a minor engaging in "sexually explicit conduct." (*See* Br. of Appellant at 17-46.) In *Adams*, the defendant similarly claimed that he was actually innocent because the government could not establish one of the required elements for conviction under Section 922(g) based on the facts admitted in the plea agreement.

Similarly, in *Peter*, a superseding Supreme Court ruling made the admitted conduct no longer a crime. And in *Rosa-Ortiz*, while the defendant's argument was based on asserted jurisdictional defects, it also may be understood as a claim that the defendant was actually innocent because the admitted facts did not amount to the crime after the court properly interpreted the statute. Likewise, Courtade argues that, when correctly interpreted, 18 U.S.C. § 2252(a)(4)(B) does not

proscribe the possession of the video at issue because the conduct depicted is not "sexually explicit conduct," and therefore, he is actually innocent. (*See* Br. of Appellant at 17-46.)

These cases thus coalesce, with any factual distinctions among them immaterial to whether Courtade's claim may be considered despite an appeal waiver. It is inconsequential, for example, that a subsequent decision rendered the admissions in the plea agreement innocent conduct in *Adams* and *Peter*; or that the defendant's actual innocence claim was presented as a jurisdictional challenge to the indictment in *Rosa-Ortiz*. Instead, the relevant analysis in these cases was whether the defendant "has made a cognizable claim of actual innocence," *Adams*, 814 F.3d at 182, such that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," *Bousley*, 523 U.S. at 623 (citation omitted). If Courtade is correct in his interpretation of Section 2252(a)(4)(B), then he is no less actually innocent than the aforementioned defendants, and it would be a miscarriage of justice to preclude his collateral attack. Just as justice demanded in *Adams*, *Peter*, or *Rosa-Ortiz*, so too should Courtade's challenge be permitted here.[4]

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[4] While the Supreme Court noted in *Bousley* that "[i]n cases where the *(cont'd)*

These decisions, from this Court and other circuits, also are consistent with the Supreme Court's guidance in *Class* for permitting an actual innocence claim to proceed despite a plea agreement appeal waiver. *See* 138 S. Ct. 804-05. Similarly, Courtade's actual innocence claim does not fall into any of the categories of claims that the Supreme Court in *Class* identified as being foreclosed by an appeal waiver in a guilty plea. First, in pressing his innocence, Courtade does not rely on anything beyond what can be found in the indictment and the admissions included in his plea agreement. As in *Class*, Courtade does not contradict either of these sources. *See* 138 S. Ct. at 804. Second, Courtade does not focus on any case-related defects that a guilty plea would make irrelevant. *See id*. at 804-05. Instead, as explained above and in Courtade's brief (*see* Br. of Appellant at 17-46), Courtade's claim is that he is innocent based on the admitted facts in his plea

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> Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges," 523 U.S. at 624, that requirement does not change the analysis of Courtade's actual innocence claim here. The charge that the government had forgone was production of child pornography in violation of 18 U.S.C. § 2251(a), which requires the government to prove that a defendant caused a minor to engage in "sexually explicit conduct." Because Courtade's claim here is that the facts to which he admitted do not establish that particular element, his showing of actual innocence for the charge to which he pleaded guilty also would apply to the government's forgone charge.

agreement and a straightforward application of 18 U.S.C. § 2252(a)(4)(B) to the content of the video in question. As this Court held in *Adams*, such a claim of actual innocence is outside the scope of an appeal waiver. 814 F.3d at 182.

III. PRUDENTIAL CONSIDERATIONS SUPPORT PERMITTING A COLLATERAL ATTACK IN THESE CIRCUMSTANCES DESPITE THE APPEAL WAIVER.

Permitting Courtade to collaterally attack his conviction based on a claim of actual innocence in these circumstances also is necessary to ensure the fundamental fairness of the plea bargaining process. The ubiquity of plea agreements is now an inescapable feature of the federal criminal justice system. *See, e.g.*, *Lafler*, 566 U.S. at 170; *Frye,* 566 U.S. at 143; *Padilla v. Kentucky*, 559 U.S. 356, 372 n.13 (2010). Such a development has been noted by many as serving numerous purposes, including reducing the burden on the courts and parties by allowing cases to be resolved more expeditiously, and offering defendants the prospect of a reduced punishment. *See Frye,* 566 U.S. at 144 ("To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties."); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Plea bargaining flows from 'the mutuality of advantage' to defendants and

prosecutors, each with his own reasons for wanting to avoid trial.") (quoting *Brady v. United States,* 397 U.S. 742, 752 (1970)). These benefits, however, must be measured against the threat to the integrity of the criminal justice system posed by a process that places tremendous pressure on defendants to plead guilty.

At their heart, guilty pleas in which the substantial majority of defendants voluntarily agree to waive their right to trial and appeal must "presuppose fairness in securing [an] agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. 257, 261 (1971). The safeguarding of judicial integrity is rightly understood as crucial, as "[i]n a government of laws, existence of government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Such fairness is integral to the health of the criminal justice system, helping to ensure the validity of guilty plea convictions and reducing the likelihood that a plea agreement results in the conviction of actually innocent individuals.

The plea bargaining process is an inherently unequal negotiation in which the government holds the advantage of dictating the terms of the plea agreement. *See United States v. Johnson*, 992 F. Supp. 437, 439–40 (D.D.C. 1997). "As a

practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought—and thus the ultimate sentence to be imposed under the guidelines scheme—is up to the prosecution." *Id.*[5] Plea agreements thus traditionally are treated as subject to special scrutiny because of this unique bargaining power of the State and the harsh consequences (*i.e.*, an individual's loss of freedom) that exercise of the State's leverage may cause. *See United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996) ("First, courts construe plea agreements strictly against the Government. This is done for a variety of reasons, including the fact that . . . the Government ordinarily has certain awesome advantages in bargaining power."); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992) (noting defendants "accept bargains because of the threat of much harsher penalties").

Such careful oversight understandably extends to waivers that are included in plea agreements, which are often drafted by the government and generally

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[5] This imbalance of power informs the procedural protections provided to defendants by the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 11 Advisory Committee Notes (1966 amendments) ("The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.").

preclude a defendant from revisiting the terms of his or her agreement. *See, e.g.*, *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) ("As the Government conceded during oral argument, defendants are generally in no position to challenge demands for . . . waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice."); *see also United States, ex rel. U.S. Attorneys v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 157 (Ky. 2014) (holding that federal prosecutors' inclusion of a provision purporting to waive claims for ineffective assistance of counsel violated state ethics rules); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, Wm. & Mary L. Rev. 1225, 1268-1275 (2016) (summarizing judicial precedent in federal courts that "focused on the fairness of the [plea] bargaining process and of plea bargain terms" in efforts to regulate certain aspects of prosecutorial discretion in the plea bargaining process).

And, in federal cases, the court must review plea agreements with an eye towards ensuring the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)). Indeed, in instances where defendants dispute the actual terms of their plea agreements,

this Court has recognized that plea negotiations necessarily implicate a defendant's core constitutional rights and, therefore, reflect heightened concerns regarding the positions of both parties that "differ fundamentally from and run wider than those of commercial contract law." *Harvey*, 791 F.2d at 300. Accordingly, this Court has acknowledged the need to "temper[]" the traditional rules of contract interpretation when interpreting plea agreements. *Id.*; *see also United States v. Yooho Weon*, 722 F.3d 583, 588 (4th Cir. 2013); *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993). Such temperance is well-earned given the ramifications of ill-conceived plea agreements and the legal questions they can engender.

Courts of appeal serve to "announce, clarify and harmonize the rules of decision employed by the legal system in which they serve." Paul D. Carrington et al., *Justice on Appeal* 3 (1976). Absent review of legal questions like those presented by Courtade, the systematic development and consistent application of the law is put at risk. *See* Arkin, 39 UCLA L. Rev. at 576. Appellate decisions "set forth the boundaries within which police, prosecutors, judges, and defense attorneys must operate if they wish to conform to the rules." David Rossman, *Were There No Appeal: The History of Review in American Courts*, 81 J. Crim. L. & Criminology 518, 519 (1990). These boundaries are at issue for Courtade, who

is pressing a claim that he pleaded guilty to a crime that he did not commit under the correct interpretation of the law. Courtade, however, is no less entitled to be subject to a proper interpretation of the law than any other criminal defendant facing the same charge. *See* Paul D. Carrington et al., *Justice on Appeal* at 2-3 (1976).

Refusing to permit his challenge due to an appeal waiver would not only infringe Courtade's constitutional right to avoid punishment for a crime he did not commit, but would further undermine public confidence in the fair and effective administration of justice in the plea agreement context.[6] *See, e.g.*, NACDL, *The*

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[6] Various projects and studies conducted by journalists and non-profit organizations, including the NACDL, have investigated the substantial number of convictions through plea arrangements in assessing whether the plea bargaining system has created inequitable results for defendants. *See, e.g.*, Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 Wm. & Mary L. Rev. 1343 (2016); Jeffrey D. Stein, *How to make an innocent client plead guilty*, The Washington Post (Jan. 12, 2018), https://www.washingtonpost.com/opinions/why-innocent-people-plead-guilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html?utm_term=.5c26a92fb0fb; Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ ("The criminal justice system in the United States today bears little relationship to what the Founding Fathers contemplated, what the movies and television portray, or what the average American believes."). Those studies have found connections between prosecutorial practices, *i.e.*, the general plea bargaining system, and increased guilty pleas even where the defendant is *(cont'd)*

Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It 1, 5 (2018), http://nacdl.org/NACDL-Trial-Penalty-Report/ ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose."). Prudential factors accordingly weigh heavily in favor of permitting Courtade's collateral attack on his conviction based on his claim of actual innocence.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

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innocent. *See, e.g.*, The Innocence Project, *Innocence Project and Members of Innocence Network Launch Guilty Plea Campaign* (Jan. 23, 2017), https://www.innocenceproject.org/guilty-plea-campaign-announcement/ ("In nearly 11% of the nation's 349 DNA exoneration cases, innocent people entered guilty pleas. Unquestionably, these cases represent just a small fraction of the innocent people who have pleaded guilty . . . ."); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges* 25-26 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), http://www.nber.org/papers/w22511.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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