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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN SCOTT WITHAM,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 21-6214

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.
Nos. 3:15-cr-00177; 3:20-cv-00277—Thomas A. Varlan, District Judge.

MICHAEL EUGENE SAVAGE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 23-3577

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
Nos. 2:96-cr-00010; 2:20-cv-03139—Michael H. Watson, District Judge.

Argued: March 20, 2024

Decided and Filed: April 8, 2024

Before: SUTTON, Chief Judge; SUHRHEINRICH and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant Witham. Eric S. Roytman, HOGAN LOVELLS US LLP, Washington, D.C., for Appellant Savage. Mahogane D. Reed, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant Witham. Eric S. Roytman, Nathaniel A.G. Zelinsky, HOGAN LOVELLS US LLP, Washington, D.C., Katherine B. Wellington, HOGAN LOVELLS US LLP, Boston, Massachusetts, for Appellant Savage. Debra A. Breneman, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee in 21-6214. Mahogane D. Reed, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Mary Beth Young, UNITED STATES ATTORNEY'S OFFICE, Columbus, Ohio, for Appellee in 23-3577.

OPINION

SUTTON, Chief Judge. After being indicted for violating one or more criminal laws, a defendant may plead guilty to some of the charges for all manner of reasons, including a commitment by the government to drop other charges or to recommend a shorter sentence. Criminal Rule 11 establishes a highly reticulated process to ensure that each defendant enters any such agreement knowingly and voluntarily. The courts do not lightly undo such bargains. Absent a mistake in the Rule 11 process or a preserved constitutional violation with respect to the plea-bargaining process, a post-conviction claimant has few options for relief other than executive-branch clemency. One narrow exception is that he may raise a claim of "actual innocence" to an offense covered by the guilty plea, say because subsequent caselaw establishes that the charge no longer amounts to a criminal offense. To obtain relief under this exception, however, the claimant must demonstrate his "actual innocence" of any "more serious" charges that the government dismissed as part of the plea deal. *Bousley v. United States*, 523 U.S. 614, 624 (1998).

Today's consolidated cases raise a variation on this issue. When plea bargainers wish to raise procedurally defaulted postconviction challenges to their offenses of conviction, but cannot

show their actual innocence of "equally serious" dismissed counts, may we excuse the default? The answer is no.

I.

A.

The first case involves Brian Witham. After finishing a term in prison for previous federal crimes, he began looking for ways to raise capital. Conventionally, he turned to a bank. Less conventionally, he and a co-defendant robbed the bank. After that, they turned to bank employees, breaking into their homes and threatening to assault their spouses and children unless the employees gave them cash from the bank vault.

The FBI caught Witham on the way to scout another bank employee. A grand jury charged him with a slew of federal crimes: bank extortion, attempted bank extortion, carjacking, felony firearm possession, and, as relevant here, six counts of using, carrying, and brandishing a firearm in relation to a crime of violence. *See* 18 U.S.C. § 924(c). Each of these last six counts carried a mandatory consecutive sentence of seven years to life. *Id.* § 924(c)(1)(A)(ii).

Witham struck a deal with the government. The government agreed to dismiss the felony firearm possession charges and five of the six § 924(c) charges. Witham pleaded guilty to the remaining charges, including one count of "using, carrying, and brandishing a firearm, during and in relation to" attempted bank extortion. *Id.* § 924(c).

At sentencing, the district court determined that Witham's § 924(c) offense carried a mandatory minimum sentence of seven years and that the remaining offenses led to an advisory guidelines range of 30 years to life—what came to a total guidelines range of 37 years to life. The government asked the court to depart from the guidelines range and impose a total sentence of about 33 years. In view of Witham's cooperation with the government, the court departed downward still further and imposed an overall sentence of 30 years. Witham appealed his sentence on due process grounds, and we dismissed the appeal based on a direct-appeal waiver. *See United States v. Witham*, No. 17-6010 (6th Cir. June 25, 2018) (order).

In 2020, Witham filed a motion to vacate his § 924(c) conviction under 28 U.S.C. § 2255.

Invoking *United States v. Davis*, 139 S. Ct. 2319 (2019), which narrowed the categories of offenses that count as "crimes of violence," he argued that he did not commit a crime of violence while using a firearm. The district court rejected the § 2255 motion, reasoning that Witham procedurally defaulted the claim by failing to raise it on direct appeal. It held that Witham's actual innocence of the attempted bank extortion/firearm charge did not make a difference when it comes to excusing the default because he could not show his innocence with respect to the other dismissed firearms charges. We granted a certificate of appealability on the issue.

B.

Michael Savage's case involves a different set of charges but comes to us in a similar procedural posture. In 1995, Savage arranged to sell crack cocaine to a buyer. On his way to the meeting place, he picked up some co-conspirators and gave them weapons. The group split up upon arrival, with the co-conspirators waiting behind a building while Savage went out to the buyer's vehicle. The co-conspirators emerged with firearms drawn. Because the ostensible buyer was an undercover federal agent, the drug transaction-turned-robbery ended with an arrest.

A grand jury indicted Savage for a slew of offenses: distribution and possession of controlled substances, conspiracy to commit an offense against the United States, attempted robbery of property belonging to the United States, intimidation of a federal official, possession of an unregistered sawed-off shotgun, and, relevant here, two counts of using or carrying a firearm during a crime of violence. Savage pleaded guilty to most of the charges, including a § 924(c) count of using a firearm during the attempted robbery of federal property. In exchange, the government agreed to dismiss the other § 924(c) charge (using or carrying a firearm during the crime of violence of assaulting a federal officer), and to dismiss the charge of possessing an unregistered sawed-off shotgun.

The court sentenced Savage to roughly twelve years in prison. Savage did not appeal. In 2007, while on supervised release, he sold crack cocaine to an undercover federal officer. In searching his residence, police found firearms and various controlled substances, all in violation of the terms of his release. The court revoked his supervised release, sentencing him to another thirty months in prison and more supervised release. Savage, again, did not appeal.

After the Supreme Court's *Davis* decision, Savage filed a postconviction challenge to his § 924(c) conviction in 2020. He argued that he was "actually innocent" of the offense because attempted robbery of federal property does not amount to a crime of violence. The district court disagreed. Our court reversed based on a confession of error. *Savage v. United States*, No. 21-3406, 2022 WL 17660329, at *2 (6th Cir. Dec. 8, 2022).

On remand, the district court denied the petition on the ground that Savage procedurally defaulted this claim when he opted not to file a direct appeal. The court concluded that it could not excuse the default because he had "ma[de] no effort to show he was actually innocent of" the two charges that were dismissed as part of his plea deal. Savage R.117 at 10. The court granted a certificate of appealability to determine whether *Bousley* requires plea bargainers to show actual innocence of dismissed counts of "equal seriousness with the count of conviction." Savage R.121.

II.

A few ground rules orient these appeals. An individual in federal custody may not obtain relief under § 2255 with respect to a procedurally defaulted claim. *See Reed v. Farley*, 512 U.S. 339, 353–54 (1994). A § 2255 petitioner who "contested his sentence on appeal, but did not challenge the validity of his plea," has "procedurally defaulted" that claim. *Bousley*, 523 U.S. at 621. A petitioner is bound by his procedural default in all but the "extraordinary case," such as when the petitioner can demonstrate "actual innocence" of the crime. *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *see Bousley*, 523 U.S. at 623.

At one level, Witham and Savage seem to have promising claims under this framework. Although they defaulted their claims by failing to raise them on direct appeal, *Davis* establishes that they are actually innocent of the charges of conviction. The government and the defendants all agree that using a firearm during attempted bank extortion (Witham's offense) and using a firearm during attempted robbery of federal property (Savage's offense) no longer qualify as § 924(c) violations. *Davis*, 139 S. Ct. at 2336.

The complication, anticipated by the Supreme Court in *Bousley*, is that before excusing a default on "actual innocence" grounds, the federal courts must account for the other charges in

the indictment that the government dismissed as a result of the plea deal. In thinking about this complication, three possibilities exist: that the government, in return for the defendant's guilty plea, dismissed (1) more serious charges, (2) less serious charges, or (3) equally serious charges.

Bousley tells us what to do when the government dismisses more serious charges through a plea bargain. It observed that, when the Government gives up "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. Since *Bousley*, we have repeatedly required petitioners to show actual innocence of any dismissed charges that are more serious than the crime of conviction. *See Peveler v. United States*, 269 F.3d 693, 700 (6th Cir. 2001); *Vanwinkle v. United States*, 645 F.3d 365, 371 (6th Cir. 2011); *Kimbrough v. United States*, 71 F.4th 468, 475 (6th Cir. 2023). Otherwise, the defendant faces a procedural default.

What of less serious charges? While *Bousley* does not say as much, it suggests that we should excuse a procedural default when, in the course of a plea deal, the government dismisses less serious charges than the now-actually-innocent charge of conviction. The D.C. Circuit has made the point explicitly (and correctly, at least in that case), noting that less serious dismissed charges should not be held against a petitioner. *United States v. Caso*, 723 F.3d 215, 223 (D.C. Cir. 2013). "[W]e should not require a person to spend 30 years in prison on an erroneous murder conviction," it explained, "because he was guilty of an uncharged theft offense that would carry a sentence of one year." *Id.* Put another way, if it is "fair" to hold the parties to their bargain to dismiss some charges in exchange for a "lesser penalty," it is "unfair" to deny relief when the dismissed charges would lead to less prison time for the defendant. *Id.*

Today's two cases present the third scenario—dismissed charges that are equally serious to the offense of conviction. Because the parties agree that the dismissed § 924(c) charges are each equally serious to the § 924(c) offenses of conviction, carrying the same statutory maximums and minimums, we need not dwell on the correct metric for gauging the point or on whether to aggregate the dismissed charges in doing so. *Cf. id.* at 222–25.

In thinking about this third category, it helps to return to *Bousley*'s reasoning. It recognized that there are "significant procedural hurdles" to claims like this one because the

federal courts have "strictly limited the circumstances under which a guilty plea may be attacked on collateral review." 523 U.S. at 621. It observed that collateral review is an "extraordinary remedy" that should not "do service for an appeal." *Id*. (quotation omitted). It noted that concerns about "finality" have "special force with respect to convictions based on guilty pleas" that were not challenged on direct appeal. *Id.* (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). It acknowledged in that case, as we must acknowledge in this one, that the traditional explanations for excusing a procedural default—cause and prejudice—thus will prove difficult when the defendant does not challenge the validity of his plea bargain on direct appeal. *Id.* at 621–23. And it determined that the only source of relief for a claimant in Bousley's position was the narrow actual-innocence exception to the procedural-default rule. *Id*. at 623. That meant the claimant must show that, "in light of all the evidence," "it is more likely than not that no reasonable juror would have convicted him"—and thus that the actual-innocence inquiry extends to "factual innocence, not merely legal insufficiency." *Id.* (quoting *Schlup*, 513 U.S. at 327–28 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970))).

For these reasons, *Bousley* concluded, plea bargainers who invoke the actual-innocence exception must "extend" their claim of actual innocence to forgone charges. *Id.* at 624. As we have explained since *Bousley*, this approach avoids "the unfairness" that would result if a petitioner could "raise a procedurally defaulted challenge to a sentence he bargained for, while escaping punishment for dismissed counts that he actually committed." *Peveler*, 269 F.3d at 701; *see Lewis v. Peterson*, 329 F.3d 934, 936 (7th Cir. 2003); *Caso*, 723 F.3d at 223.

Each thread of *Bousley*'s reasoning leads to the same place—that petitioners who secure the dismissal of equally serious charges face the same requirements that apply to dismissal of more serious charges. When a defendant enters a plea bargain after an indictment or after a charge bargain before an indictment, he makes a calculation of risk that the benefits of the plea bargain (a shorter sentence and fewer charges) outweigh the burdens (giving up the right to a trial by jury and the possibility of acquittal). If the defendant makes that choice with respect to one § 924(c) charge, it is likely he would make the same choice with another § 924(c) charge.

If it is fair to hold the defendant to the bargain in the context of the dismissal of a more serious charge, it is fair to do the same with the same charge (or another equally serious charge).

In both settings, "allowing a petitioner to raise a procedurally defaulted challenge to a sentence he bargained for, while escaping punishment for dismissed counts that he actually committed," would flip the risk calculation on its head. *Peveler*, 269 F.3d at 701. Compared to those who opted for a jury trial, the plea bargainer would face both a shorter sentence at the outset and a similar chance at postconviction relief down the line. The finality of proceedings would have no more "special force" for plea bargainers than for those who maintain their innocence. *Bousley*, 523 U.S. at 621 (quotation omitted). The balance struck in *Bousley* was to permit collateral attacks on guilty pleas to avoid injustice to a defendant, not to enable a "windfall." *Lewis*, 329 F.3d at 936.

"[O]nly if [the government] charges a less serious crime," as the Seventh Circuit concluded, "is there a strong reason to believe that the defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid." *Id.* at 937. Choosing to pursue one "equally serious" charge over the other does not unfairly benefit the government. *Id.* Had the government realized that "the charge to which [the petitioner] pleaded guilty was unsound," it "would have switched the plea to the sound charge," and "the punishment would probably have been the same." *Id.* The Seventh Circuit added that there is a material difference in kind between dismissing "less serious" and "equally serious" charges—the bad bargain and the good one—making it appropriate to treat them differently.

A case-specific argument that *Bousley* rejected suggests as much. As it happens, *Bousley* itself involved multiple potential § 924(c) offenses. 523 U.S. at 624. The government in *Bousley* argued that the petitioner could not attack his § 924(c) conviction unless he could show actual innocence of a different § 924(c) offense with which he had not been charged. *Id.* According to the government in *Bousley*, then, the plea bargain there, like the plea bargain here, involved the decision not to pursue equally serious charges. Yet *Bousley* did not reject the government's argument on the ground that it had identified only an equally serious (not a more serious) § 924(c) charge. Rather, the Court rejected the argument because "no record evidence"

suggested that the government had ever contemplated this second charge. *Id.* This inquiry would have been entirely superfluous under the petitioners' reading of *Bousley*. *Id.*

We thus join the Seventh Circuit—the only one to resolve this issue—in holding that the *Bousley* rule "does not require that the charge that was dropped or forgone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty. It is enough that it is as serious." *Lewis*, 329 F.3d at 937. If a petitioner has accepted a plea bargain, he may not collaterally attack his conviction unless he can show that he is actually innocent of equally or more serious charges dismissed as part of the bargain. Because Witham and Savage's plea agreements both involved the dismissal of § 924(c) charges, and because neither of them has shown actual innocence of the dismissed charges, we may not excuse their procedural defaults.

Witham and Savage raise several objections to this conclusion. They point out that *Bousley* by its terms applies only to "more serious" dismissed charges. 523 U.S. at 624. That is true. But "we don't read precedents like statutes." *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015). The reasoning of the decision applies here. Just as *Bousley*'s rationale may well help prisoners when the dismissed charges are less serious than the accepted ones, it does not help petitioners when the dismissed charges are more or equally serious than the accepted charge.

The petitioners claim that the Third and Eighth Circuits have gone the other way. *See United States v. Lloyd*, 188 F.3d 184 (3d Cir. 1999), *abrogated in part on other grounds by Dodd v. United States*, 545 U.S. 353, 357 (2005); *United States v. Johnson*, 260 F.3d 919 (8th Cir. 2001) (per curiam). We read the decisions differently. *Lloyd* merely holds that a petitioner is "not required to demonstrate actual innocence of a foregone, *less* serious charge." 188 F.3d at 185 (emphasis added). *Johnson* gives more pause than comfort to the petitioners. In the only two relevant sentences of the opinion, the court says that it is addressing a claim by the government that the dismissed charge was "more serious" than the convicted charge. 260 F.3d at 921. It never discusses the distinct concerns of equally serious charges and indeed never uses that phrase or one like it.

The petitioners also claim that Congress changed everything when it enacted 18 U.S.C. § 3296 in 2002, four years after the Court decided *Bousley*. Section 3296 establishes that, if a criminal defendant successfully vacates his plea, the government may reinstate any dismissed counts even after the statute of limitations has run on them. *Id.* § 3296(a). As the petitioners see it, § 3296 undermines the explanation for *Bousley* and essentially occupies the field. To quote Savage, Congress "decided" when it passed § 3296 that the remedy to address the "unfairness that may arise when a petitioner vacates his plea" was "to suspend the statute of limitations and allow the government to reinstate forgone charges—*not* to require a defendant to prove his innocence of [forgone] charges." Savage Appellant's Br. 33. He accuses the district court of distorting a "judge-made procedural default rule" by extending *Bousley*'s "judge-made equitable caveat" after "Congress has already addressed" the same problem by statute. *Id.* at 5, 8, 9.

We are not convinced. In the two decades since the passage of § 3296, the Supreme Court has not held, said, or hinted that this statute cuts back on *Bousley* or for that matter overrules it. As an intermediary appellate court, we must follow Supreme Court decisions until directed otherwise. For what it is worth, none of the lower court decisions to grapple with these issues over the last two decades, including the Seventh Circuit in *Lewis* and the D.C. Circuit in *Caso*, even cites the statute in the discussion.

There are good reasons why neither the Supreme Court nor any other court has invoked § 3296 in this way. The decision and the statute speak to distinct issues and proceedings. *Bousley* tells courts how to address procedurally defaulted claims in the context of the "extraordinary remedy" of postconviction relief. *Bousley*, 523 U.S. at 621. Section 3296 applies after a defendant successfully vacates a plea agreement, for all manner of reasons and in all manner of contexts, in order to give the government time to pursue a new conviction. The possibility that the government might move to reinstate dismissed counts under § 3296 does not displace the imperative to enforce procedural default rules and the finality of criminal judgments. *See Bousley*, 523 U.S. at 621; *Schlup*, 513 U.S. at 322 (drawing procedural default lines to prioritize "finality, comity, and conservation of judicial resources" (quotation omitted)).

The defendants' suggestion that Congress enacted § 3296 to cover post-conviction remedies and overrule *Bousley* in the process is belied by the language of the statute. It directs district courts to grant a motion to reinstate counts that "were dismissed pursuant to a plea agreement" when "the guilty plea was subsequently vacated on the motion of the defendant." That language does not cover just *postconviction* motions to vacate sentences. It likely allows charges to be reinstated if a district court allows a defendant to withdraw his plea before sentencing, *see* Fed. R. Crim. P. 11(d), or if a defendant successfully appeals his conviction, *see United States v. Petties*, 42 F.4th 388, 397–98 (4th Cir. 2022). Even in the postconviction posture, it is an open question whether the statute applies to a case like this one. When a defendant pleads guilty to multiple offenses, as Witham and Savage did, does granting a § 2255 motion to correct a sentence on just one of the counts rises to the level of the vacatur "of the guilty plea"? *Id.* At the very least, the reality that § 3296 applies across the board to more serious, equally serious, and less serious dismissed charges shows that § 3296 does not take on the concerns *Bousley* addressed.

While Savage frames *Bousley* as a "judge-made . . . carve-out to the actual-innocence exception," Savage Appellant's Br. 3, the decision in truth harmonizes *two* judge-made rules. On the one side sits the procedural default rule, which "limit[s] the habeas practice" that the Court "radically expanded in the early or mid-20th century." *McQuiggin v. Perkins*, 569 U.S. 383, 402 (2013) (Scalia, J., dissenting). On the other side sits the actual innocence rule, which applies when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Before *Bousley*, it was not clear how those two judge-made doctrines applied to plea bargainers. Could a person who pleaded guilty still be considered "actually innocent"? *See Bousley*, 523 U.S. at 630 (Scalia, J., dissenting) (noting that, until *Bousley*, the Supreme Court had applied the actual innocence doctrine only after a conviction by a jury). *Bousley* draws that line. A plea bargainer *can* qualify as "actually innocent" and thus have his procedural default excused, but only if he can show factual innocence of his offense of conviction and certain other forgone charges. *Id.* at 623–24 (majority opinion). *Bousley*, in short, is not an exception to Congress's habeas scheme. It brings

the various threads of the Court's habeas doctrine together in a way that allows some plea bargainers to get relief.

Petitioners' repeated concerns about "judge made" rules also do not account for the words of the statute under which Savage and Witham sought relief: 28 U.S.C § 2255. "If the court finds," it says, "that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or *that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack*, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." *Id.* § 2255(b) (emphasis added). Procedural default rules work with—they do not contradict—the italicized language: "that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." When Congress passed § 2255 in 1948, as the Court explained in *United States v. Frady*, it brought the common law customs of habeas law with it, including the longstanding rule that "a collateral challenge may not do service for an appeal." 456 U.S. 152, 165 (1982). It's not enough to win a "collateral attack," in other words, to show a constitutional violation by itself. The petitioner must show that it is "vulnerable" to attack years later. Judge-made or not, old or new, *see Massaro v. United States*, 538 U.S. 500, 504 (2003), the procedural-default rule amounts to a fair way to operationalize the words of the key congressional statute on point.

No doubt, if we faced the choice between applying an equitable judge-made rule or a statute "directly address[ing]" the issue, we would pick the statute. *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996); *see id.* at 323 (explaining that courts make equitable rules to govern habeas relief "when Congress has not resolved the question"). But § 3296 simply does not speak to the issue, and there is another statute in play anyway: § 2255.

The two statutes work together, moreover, not apart. Under § 2255 (as under § 2254), it is difficult for plea bargainers to raise defaulted postconviction challenges. *See Bousley*, 523 U.S. at 621, 624. They need to exercise diligence in pursuing their claims on direct appeal or show that theirs is the unusual case that warrants excusing procedural default. That is not easy

because the petitioner faces the burden of proof and the government may use evidence not in the record to counter the petitioner's claims. *Id.* Under § 3296, the government has an extended timeline in which to pursue a new conviction in the event the petitioner vacates his guilty plea for any reason, whether in front of the trial court, on direct appeal, or in a collateral attack. *See* 18 U.S.C. § 3296. Each statute is trained at different objectives, imposes different burdens, and is subject to different evidentiary rules. Respecting each of these laws does not undermine the National Legislature's approach. It's the approach Congress put in place.

It does not change matters that one explanation for *Bousley*, at least according to the lower courts, is that the relevant statute of limitations might make it difficult to reinstate dismissed charges. *See Peveler*, 269 F.3d at 701; *Lloyd*, 188 F.3d at 189 n.11. But even if we accepted that this was one potential explanation for *Bousley* and even if we accepted that § 3296 addressed that problem, that offers no reason for ignoring the other explanations for *Bousley*, indeed the only explanations the Court offered. Even before § 3296 extended these statutes of limitations, it's well to remember, the government sometimes was not time-barred from reinstating those charges that did not have a statute of limitations. *See, e.g.*, *Hawk v. Berkemer*, 610 F.2d 445, 446–47 (6th Cir. 1979).

The petitioners are correct that *Bousley* could have explicitly stated that plea bargainers must show actual innocence of "more *or equally* serious charges." But they must come to grips with the reverse. *Bousley* might just as easily have explicitly stated that plea bargainers need "*only*" show actual innocence of "more serious charges."

The petitioners worry that requiring a defendant to demonstrate actual innocence of a dismissed charge is "in serious tension with the constitutional presumption of innocence." Savage Appellant's Br. 43–44. But that critique goes to the correctness of *Bousley*, not to today's case. The argument at any rate is undercut by the reality that the presumption of innocence applies to criminal defendants, not to convicted felons seeking to collaterally attack their convictions after failing to do so on direct appeal. *See Herrera v. Collins*, 506 U.S. 390, 399 (1993). The government can lawfully require a petitioner seeking postconviction relief to show more than just innocence. It can require a petitioner to demonstrate that his is an

"extraordinary case" warranting relief, *Schlup*, 513 U.S. at 321 (quotation omitted), including by showing that he is "factual[ly]" innocent, *Bousley*, 523 U.S. at 623.

The petitioners claim that we should not require them to show actual innocence of the dismissed firearms charges to the extent that they relate to distinct conduct from the § 924(c) offenses underlying their convictions. For example, while Witham pleaded guilty to using a firearm when he attempted bank extortion on October 21, 2015, the dismissed charges related to his use of a firearm in committing crimes on other days. But nothing in *Bousley* limits its reasoning to identical crimes committed on the same day or to otherwise identical offenses. Otherwise, why have an exception for "more serious" crimes? The Fourth Circuit's decision in *United States v. Adams* may well suggest an exception to *Bousley* when the conduct underlying the dismissed charges is "dissimilar" from the offense of conviction, such as when the dismissed charges relate to robbery and the offense of conviction concerns felony possession of a firearm. 814 F.3d 178, 184 (4th Cir. 2016). But, even on its own terms, *Adams* does not apply to this case. All of the dismissed charges against Witham and Savage are firearms offenses, making it odd to call them "dissimilar." In fact, *Adams* itself treated charges "focused on underlying criminal conduct relating to firearms" as similar. *Id.*

The petitioners each point to specific facts that purportedly justify case-specific exceptions to these rules for their appeals. Savage, for instance, highlights that his plea bargain involved only one dismissed § 924(c) charge, as compared to Witham's multiple. Witham, meanwhile, stresses the various ways that he cooperated with prosecutors and helped them secure convictions. These facts and circumstances, however, are more relevant to resolving whether the petitioners were prejudiced by the imposition of now-invalid charges than whether they need to show that they are actually innocent of them. Although the logic of *Bousley* in some ways echoes a prejudice or harmless-error analysis, *see Lewis*, 329 F.3d at 937, different standards apply to each inquiry, *see Schlup*, 513 U.S. at 327. Prejudice does not necessarily require courts to peer behind the plea bargain to look at forgone charges, whereas actual innocence does. *See United States v. McKinney*, 60 F.4th 188, 197 (4th Cir. 2023). And while we take a totality-of-the-circumstances approach to determining whether a petitioner has suffered prejudice or a harmful error, *Frady*, 456 U.S. at 169, *Bousley* turns this general standard into the

more specific rule that the petitioner must show actual innocence of forgone charges. *Bousley* requires only that courts ask (1) whether the plea bargain at issue involved dismissed charges, and (2) whether those dismissed charges were more, equally, or less serious than the offense of conviction. *See* 523 U.S. at 624; *see, e.g.*, *Kimbrough*, 71 F.4th at 475. Those objective criteria work against some petitioners and in favor of others. Just as we may not selectively ignore *Bousley*'s "actual innocence" showing when the facts-and-circumstances equities of a plea bargain favor a particular petitioner, we cannot extend *Bousley*'s burden to less serious charges when those equities run in the other direction.

As one final point, Savage contests the district court's determination that he cannot show good cause for his procedural default. But he never obtained a certificate of appealability on the district court's conclusion that he failed to show good cause. That question thus is not properly before us. *See* 28 U.S.C. § 2253(c). Nor has Savage demonstrated that "reasonable jurists could debate whether the district court should have granted relief," the threshold showing for the issuance of a certificate of appealability. *Mitchell v. United States*, 43 F.4th 608, 614 (6th Cir. 2022) (quotation omitted).

We affirm.