

United States Court of Appeals
For the Eighth Circuit

No. 25-2954

Charlie Foster

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: September 24, 2026

Filed: October 19, 2026

Before LOKEN, BENTON, and ERICKSON, Circuit Judges.

BENTON, Circuit Judge.

Charlie Foster pled guilty to being a felon in possession of a firearm. The district court¹ sentenced him to 210 months in prison. In August 2023, Foster filed a pro se 28 U.S.C. § 2255 motion. The district court denied the motion. Foster

¹The Honorable Timothy L. Brooks, Chief Judge, United States District Court for the Western District of Arkansas.

appeals. Having jurisdiction under 28 U.S.C. §§ 1291 and 2255(d), this court affirms.

In 2019, Foster pled guilty to being a felon in possession of a firearm, preserving his right to appeal the denial of a motion to suppress. At sentencing, the district court applied an enhanced sentencing range of 15 years to life under the Armed Career Criminal Act, due to three prior methamphetamine convictions under Arkansas Code § 5-64-401(a). See **18 U.S.C. § 924(e)(1)**. Foster appealed the denial of the motion to suppress. This court affirmed. See *United States v. Foster*, 15 F.4th 874, 878 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1434 (2022). The Supreme Court denied his petition for writ of certiorari in March 2022.

In August 2023, Foster filed this pro se § 2255 motion asserting two claims of ineffective assistance of counsel for flawed advice about his ACCA status. He argued that based on new caselaw, his Arkansas meth convictions are not “serious drug offenses” that qualify as predicate offenses under the ACCA. Conceding the motion was untimely, Foster argued the procedural default should be excused because he is “actually innocent” of the ACCA enhancement, as the Arkansas meth convictions are not predicate offenses. In the district court, Foster abandoned his ineffective-assistance-of-counsel claims, but continued to challenge his sentence as in excess of law, due to the ACCA enhancement.

The district court denied the motion as untimely, concluding the actual innocence exception does not apply because Foster had not shown “factual innocence” of the felon in possession conviction or the Arkansas meth convictions. The district court also ruled that Foster’s Arkansas meth convictions were serious drug offenses under the ACCA based on *United States v. Meux*, 918 F.3d 589 (8th Cir. 2019).

Foster appeals, claiming his untimely motion is excused under the actual innocence exception and that *Meux* does not control.

I.

Foster urges this court to excuse the untimeliness of his motion based on the actual innocence exception. “This court reviews de novo the legal issues in the denial of a § 2255 motion.” **Goodwin v. United States**, 869 F.3d 636, 638 (8th Cir. 2017).

“[A]ctual innocence, if proved, serves as a gateway through which a [habeas] petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations.” **McQuiggin v. Perkins**, 569 U.S. 383, 386 (2013). For actual innocence, Foster must: (1) support his allegations “with new reliable evidence that was not presented at trial” and (2) “establish that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” **Weeks v. Bowersox**, 119 F.3d 1342, 1351 (8th Cir. 1997).

A.

The new reliable evidence Foster cites is caselaw applying a “categorical approach” to determine whether a state offense is a serious drug offense under the ACCA. Thus, “a state drug offense counts as an ACCA predicate only if the State’s definition of the drug in question ‘matche[s]’ the definition under federal law.” **Brown v. United States**, 602 U.S. 101, 106 (2024), *quoting Shular v. United States*, 589 U.S. 154, 158 (2020). Foster argues that Arkansas Code § 5-64-401(a) defines meth more broadly than the federal drug schedule, and no fact finder would find him guilty of the ACCA enhancement.

New caselaw is not generally new reliable evidence supporting a claim of actual innocence. “In *Schlup*, the [Supreme] Court provided several examples of ‘reliable evidence,’ including ‘exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.’” **Nash v. Russell**, 807 F.3d 892, 899 (8th Cir. 2015), *quoting Schlup v. Delo*, 513 U.S. 298, 324 (1995). Foster does not present such evidence in support of his actual innocence claim.

B.

Even assuming new caselaw qualifies as new reliable evidence, Foster’s claim fails. The actual innocence exception does not apply when a defendant challenges a noncapital sentence, rather than his factual innocence of the crime of conviction or the underlying state convictions.

This court once held that the actual innocence exception excused a procedurally defaulted habeas motion where the defendant was innocent of the sentence because the sentencing statute did not apply. *See Jones v. Arkansas*, 929 F.2d 375, 381 (8th Cir. 1991) (“It would be difficult to think of one who is more ‘innocent’ of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant.”). Reaching the merits, this court said that Jones’s sentence under a statute not in force when he committed the crime and which did not apply to him “violated the ex post facto clause of the Constitution, denying Jones due process.” *Id.*

However, this court sitting en banc rejected an actual innocence claim challenging a noncapital sentence. *Embrey v. Hershberger*, 131 F.3d 739, 741 (8th Cir. 1997) (en banc). Embrey filed a § 2255 motion raising issues that were procedurally defaulted because they had been denied on the merits. *Id.* at 740. To overcome the procedural default, he asserted actual innocence of his sentence because the statute did not apply to him. *Id.* This court rejected his assertion, stating “in noncapital cases the concept of actual innocence is easy to grasp because it simply means the person didn’t commit the crime.” *Id.* (cleaned up).

This court reasoned that a “legal claim that a substantive criminal statute has been wrongly applied to facts can . . . always be converted into a complaint that the relevant facts did not support a conviction and that therefore the defendant was ‘actually innocent,’” but “that proves too much, for then any such claim can be said to be one of actual innocence.” *Id.* at 741. This court concluded that actual innocence does not apply to challenges to a noncapital sentence. *Id.* *See Dretke v.*

Haley, 541 U.S. 386, 392 (2004) (saying *Embrey* held there is “no actual innocence exception for noncapital sentencing error”).

This court is bound by *Embrey*. See **Lindsey v. United States**, 615 F.3d 998, 1001 (8th Cir. 2010) (“We have previously held . . . that the actual innocence exception to the procedural default rule is not available to remedy errors in noncapital sentencing.”); **United States v. Wiley**, 245 F.3d 750, 752 (8th Cir. 2001) (“[W]e have held that the actual-innocence exception does not apply to noncapital sentences.”). In *Lindsey*, the actual innocence exception did not apply because “Lindsey makes no argument that he is actually innocent of being a felon in possession of a firearm. Rather, he asserts he did not previously commit two crimes of violence, as required by the [ACCA] sentencing enhancement.” **Lindsey**, 615 F.3d at 1001. The same is true here, where Foster asserts he did not previously commit three serious drug offenses as required by the ACCA sentencing enhancement but does not argue he is actually innocent of the felon in possession conviction or the Arkansas meth convictions.

Foster’s claim of actual innocence of the ACCA enhancement is precluded by *Embrey*. His motion is time-barred under the statute of limitations, 28 U.S.C. § 2255(f).²

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The judgment is affirmed.

²This court thus need not reach the merits of Foster’s § 2255 motion that his “sentence was in excess of the maximum authorized by law.” 28 U.S.C. § 2255(a).