18-6675

No. 18-_____

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

IN RE:

RYAN LEE ZATER,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2241

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Pro se

30 day of October, 2018

Question Presented for Review

This Court held the residual clause of "the universal definition of 'crime of violence'," 18 U.S.C. §16(b), is constitutionally void-for-vagueness. Sessions v Dimaya, 138 S.Ct. 1204 (2018). Therein, Chief Justice Roberts opined that "§16 is replicated in the definition of 'crime of violence' applicable to §924(c)," and that "the Court's holding calls into question convictions under" §924(c) as well. Then this Court instructed the courts of appeals to reconsider §924(c)(3)(B) in light of Dimaya. See, e.g., United States v Jackson, 138 S.Ct. 1983 (2018), and United States v Jenkins, 138 S.Ct. 1980 (2018).

Multiple circuit courts of appeals extended Dimaya to invalidate §924(c)'s residual clause as well. See United States v Salas, 889 F.3d 681, 686 (10th Cir. 2018); United States v Eshetu, 2018 U.S.App.LEXIS 21526 (D.C. Cir. Aug. 3, 2018); and United States v Davis, 2018 WL 4268432 (5th Cir. 2018). The Seventh Circuit came to this conclusion even before Dimaya in United States v Cardena, 842 F.3d 959, 996 (7th Cir. 2016).

Yet the Eleventh Circuit held in Ovalles v United States, No. 17-10172 (11th Cir. Oct. 4, 2018)(en banc), if §924(c)'s residual clause must use the categorical approach, then it is doomed; the Court decided to create a conduct-based construction in order to save the statute from unconstitutionality. See also United States v Barrett, No. 14-2641 (2d Cir. Sept. 10, 2018); and United States v Douglas, No. 18-1129 (1st Cir. Oct. 12, 2018).

The question presented is:

Considering this circuit split that has developed, does the Fourth Circuit's denial of Zater's §2244 application, which would have been granted in other circuits under the divergent gatekeeping protocols, create exceptional circumstances warranting an exercise of this Court's supervisory powers, since Zater's sole predicate conviction of §371 conspiracy can only categorically be considered a "crime of violence" through §924(c)'s now-void residual clause?

Relief Sought

Zater prays this Court for issuance of an extraordinary writ to:

a. resolve the split amongst the circuits as to the proper gatekeeping threshold under §2244;

b. resolve the split amongst the circuits as to §924 (c)(3)(B)'s constitutionality;

c. resolve the split amongst the circuits as to which approach §924(c)'s residual clause must utilize - categorical or conduct-based;

d. reverse the Fourth Circuit's 18 September 2018 Order (No. 18-340), and remand for consideration in light of the above resolutions;

e. grant Zater leave to pursue his claims in the first instance at the district court level; and

f. any and all further relief this Court deems just and proper.

Unavailability of Relief in any other Court or Forum

No other court can grant the relief sought by this petition because only this Court has the jurisdiction to "review the gate-keeping orders" of 28 U.S.C. §2244 issued by the appropriate court of appeals. See Felker v Turpin, 518 U.S. 651, 666-667 (1996). The failure of this Court to correct the Fourth Circuit's clearly erroneous rulings in the instant matter will divest this Court of its certiorari power, which could amount to a suspension of the writ of habeas corpus. See 28 U.S.C. §2244(b)(3)(E); and Bagley v Byrd, 534 U.S. 1301, 1302 (2001). Such review will also aid this Court's appellate jurisdiction by exercising its general supervisory control over the federal court system. See, e.g., Connor v Coleman, 440 U.S. 612, 624 (1979).

Statement of Reasons for not Making Application to the District Court in the District in Which Zater is Held

Pursuant to statutory authority, Zater was bound to make his request for leave to file a second §2255 to the Fourth Circuit Court of Appeals. See 28 U.S.C. §2244(b)(3)(A). The only court with authority to review such gatekeeping orders is the Supreme Court of the United States. See Felker, supra. The district court in which Zater is held would have no legal standing to review an order of a court of higher authority, whereas filing the instant motion with this Court is the only proper venue to adjudicate the claims infra.[1]

1/ In addition, a circuit split exists regarding the ability to file a §2241 in the lower courts on issues such as the ones presented herein. Compare McCarthan v Dir. of Goodwill Indus-Suncoast, 851 F.3d 1076 (11th Cir. 2017) (en banc), with United States v Wheeler, 886 F.3d 415 (4th Cir. 2018). Since Zater is confined in the Eleventh Circuit, McCarthan precludes him from filing a §2241.

List of Parties in Court Below

1. Ryan Lee Zater, petitioner pro se
2. Stacey D. Haynes, Assistant U.S. Attorney
3. The Honorable Judge Barbara Milano Keenan, Fourth Circuit Court of Appeals
4. The Honorable Judge Robert B. King, Fourth Circuit Court of Appeals
5. The Honorable Judge Allyson K. Duncan, Fourth Circuit Court of Appeals

Citation of Lower Court Decisions

Originating District Court Case No. 3:00-cr-00626-CMC

All of the following decisions are unpublished and attached hereto in the Appendix.

Appendix A

United States v Zater, 25 Fed. Appx. 112 (4th Cir. 2001)
-- Direct Appeal

Appendix B

United States v Zater, No. 3:02-cv-946-20 (D.S.C. Dec. 17, 2002)
-- Initial §2255

Appendix C

In re: Ryan Lee Zater, No. 16-776 (4th Cir. June 7, 2016)
-- §2244 application based on Johnson/Welch

Appendix D

In re: Ryan Lee Zater, No. 16-9529 (4th Cir. July 8, 2016)
-- §2244 application based on Johnson/Welch

Appendix E

In re: Ryan Lee Zater, No. 18-340 (4th Cir. Sept. 18, 2018)
-- §2244 application based on Dimaya

Controlling Constitutional Provisions, Statutes and Rules

Article 1, Section 9, Clause 2 of the U.S. Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended."

Article 3, Clause 2, of the U.S. Constitution provides: "[T]he Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Amendment V of the U.S. Constitution provides in part: "... without due process of law..."

Title 28, United States Code, section 2241(a) provides: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any Circuit Judge within their respective jurisdictions..."

Title 28, United States Code, section 2244(b)(2)(A) provides: "A claim presented in a second or successive habeas corpus application...that was not presented in a prior application shall be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Supreme Court Rule 20(4) provides: "A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§2241 and 2242, and in particular with the provision in the last paragraph of §2242, which requires a statement of the reasons for not making application to the district court of the district in which the applicant is held."

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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:
RYAN LEE ZATER,
Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2241

Ryan Lee Zater, petitioner pro se, respectfully prays this Court for a writ of habeas corpus, pursuant to 28 U.S.C. §2241.

Jurisdictional Statement

This Court has jurisdiction to issue the requested writ under 28 U.S.C. §2241 and Supreme Court Rule 20, as expressed in Felker v Turpin, 518 U.S. 651, 667 (1996).

Timeliness

With respect to applications for extraordinary relief, such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation. In re Anderson, 511 U.S. 364, 366 (1994). "§2241 habeas authority ... specifies no time limit." I.N.S. v St. Cyr, 533 U.S. 289, 334 (2001).

Although a petitioner must act with "due diligence." See Johnson v United States, 544 U.S. 295, 309 n.7 (2005). There should be evidence showing reasonable efforts to timely file his action," Dodd v United States, 365 F.3d 1273, 1282 (11th Cir. 2004), but he need only show "an appropriate degree of diligence for someone in his situation." Myers v Allen, 420 Fed. Appx. 924, 927 (11th Cir. 2011).

In addition to the extraordinary writ not being subject to any time limitations, Zater has exercised due diligence by (a) exhausting every available remedy in a timely manner, and (b) filing the instant motion within 90 days of the latest Fourth Circuit denial of his §2244 application.

Statement of the Case

A. Factual Background:

At the relatively youthful age of 21 years old, Zater conspired with his older brother and two of his brother's friends to rob a bank. The group decided to not rob a bank near their hometown of Jacksonville, Florida, so they drove up to North Carolina. They found a bank in Asheville, and cased it and its surrounding area for about a week. Not long before the robbery occurred, they decided the area was not condusive to a bank robbery and called it off.

Not long thereafter, Zater's older brother reconvened the group to discuss a second attempt. This time they drove up to Spartanburg, South Carolina, and cased a bank and its milieu for about a week. On the night before the robbery was to occur, they stole a vehicle to use in the robbery. On June 26, 2000, they robbed the Carolina Southern Bank of about $36,000.

Two weeks later the group met once again. This time they drove up to Columbia, South Carolina, cased a bank and its environs, and stole a vehicle the night before the robbery was to be carried out. When the group arrived at the bank the next morning, there was a traffic accident right out front with a heavy police presence, so they called the robbery off.

Another two weeks would elapse before Zater's older brother brought the group back together. They returned back to Columbia, South Carolina, but chose a different bank than their previous failed attempt. They cased it and the surrounding area for about a week, then stole a car on the night before the robbery was to occur. On July 24, 2000, Zater and his codefendants robbed a BB&T bank of about $111,000.

This last robbery did not go as planned. A few blocks from the bank the group split up. A police officer attempted a traffic stop on Zater's vehicle, and a high-speed chase ensued. After a second officer head-on collisioned into Zater's car, petitioner Ryan Zater was the only defendant who immediately took flight on foot without taking any weapons with him. Nevertheless, after Zater had left the scene, his brother and a codefendant engaged law enforcement in an exchange of gunfire which injured two officers, before they fled themselves. A cordon was set up, and eventually all were apprehended.

At the time of Zater's arrest, his criminal record only consisted of a few driving infractions and misdemeanor marijuana possession offenses.

B. Plea & Sentencing Background:

On September 20, 2000, Zater was charged in a multi-count, multi-defendant superseding indictment, in the District of South Carolina, Columbia Division. Count One charged conspiracy to commit bank robbery, in violation of 18 U.S.C. §371. Counts Two and Four charged Zater with armed bank robbery, in violation of 18 U.S.C. §2113(a)(d). Counts Three and Six charged Zater with using a firearm while committing a crime of violence, in violation of 18 U.S.C. §924(c).

On November 9, 2000, pursuant to a plea agreement, Zater entered a plea of guilty only to the conspiracy count and the two firearm counts; the substantive bank robbery counts were dismissed.

On March 28, 2001, for his first time in prison, Zater was sentenced before the Honorable Dennis W. Shedd, to a term of imprisonment of 444 months (37 years). This consisted of sixty months on the conspiracy count (§371), eighty-four months consecutive on the first firearm count (§924(c)), and three hundred months consecutive on the second firearm count (§924(c)). When sentencing Zater, Judge Shedd remarked: "You had a pistol

but you left it...[when] you took off running." Because Zater fled before the gun-battle occurred, it prompted Judge Shedd to call Zater "the smartest one in the crowd" for his non-violent flight.

C. Appellate Background:

On December 20, 2001, the Fourth Circuit affirmed Zater's sentence on direct appeal when his attorney filed an Anders brief. See United States v Zater, 25 Fed. Appx. 112 (4th Cir. 2001)(unpublished).

Zater filed his initial timely §2255 motion on March 22, 2002, Case No. 3:02-cv-946-20, which the district court denied by summary judgment on December 17, 2002. The Fourth Circuit denied a certificate of appealability on May 22, 2003, and this Court denied discretionary review on November 17, 2003.

After this Court issued the Johnson/Welch combo, invalidating the residual clause of the ACCA, Zater filed two timely §2244 applications seeking permission to file a second §2255. See In re Zater, No. 16-776 (4th Cir. June 7, 2016) (unpublished), and In re Zater, No. 16-9529 (4th Cir. July 8, 2016)(unpublished). Both were quickly denied under the reasoning that Zater's "offense" of bank robbery falls under the force clause of §924(c), even though those counts were dismissed during sentencing. Under the categorical approach, this Court has held that only the statute of "conviction" may be considered -- and Zater was only convicted on the conspiracy count, which means the Fourth Circuit misapplied the categorical approach during the gatekeeping stage by looking to the specific facts of Zater's case when it considered the dismissed substantive counts of bank robbery.[2]

2/ In contrast, when the Fourth Circuit denied Zater's brother leave to file a second §2255 under Johnson/Welch, it held that his brother's "convictions" for bank robbery fell under the force clause. This was because Zater's brother did NOT have his substantive bank robbery convictions dismissed. See In re: Brian P. Zater, Nos. 16-787 & 16-9382 (4th Cir. 2016)(unpublished).

Thereafter, Zater moved this Court for a Writ of Mandamus on October 17, 2016, seeking to have it review the Fourth Circuit's denials of Zater's §2244 applications. This Court denied discretionary review on February 17, 2017.

After this Court issued its Dimaya decision, and multiple circuit courts of appeal extended that holding to also invalidate §924(c)'s residual clause, Zater once again moved the Fourth Circuit for permission to file a second §2255 by filing a §2244 application in August of 2018. The application was denied without explanation by the Fourth Circuit's clerk on September 18, 2018.

Zater now files this petition for a writ of habeas corpus seriatim seeking review and resolution of the divergent §2244 gatekeeping thresholds, and the circuit splits on both the constitutionality of §924(c)'s residual clause and the proper approach to utilize.

Preliminary Statement

This Court decided in Johnson that the ACCA's residual clause was unconstitutionally vague. Then, for the first time in a §2255 setting, this Court held that new rule retroactive within a year of announcing it, opening the door for second §2255 requests. After multiple circuit splits accumulated in regards to Johnson's applicability toward other similar statute's residual clauses, this Court once again waded into the fray by issuing its Dimaya decision, invalidating §16(b)'s residual clause as unconstitutionally vague. Another circuit split has developed after this latest ruling in regards to its identically-worded cousin §924(c), which utilizes the same determining characteristics that rendered the previous two unconstitutional.

Dimaya, like Johnson, is also retroactive through multiple holdings that logically dictate its retroactivity, as explained by this Court's Tyler v Cain [3] holding.

3/ Tyler v Cain, 533 U.S. 656, 668-69 (2001)(O'Connor, J., Concurring).

Zater's sole substantive offense of conviction was for **conspiracy** to commit bank robbery under 18 U.S.C. §371. Every court to analyze the matter has held that conspiracy (in whatever context) falls under the corresponding statute's residual clause. Since neither of Zater's §924(c) enhancement convictions could be applied through the now questionable associated residual clause, and since his predicate conspiracy conviction fails to qualify under §924(c)'s force clause, there is a meritorious argument that Zater is actually innocent of his §924(c) convictions. Therefore, he filed a timely motion pursuant to §2244, seeking authorization to file a subsequent §2255. The prima facie threshold required by §2244 was clearly evident, as numerous sister circuits have held that standard satisfied in cases similar to Zater's. But the Fourth Circuit has adopted a divergent/stricter gatekeeping §2244 inquiry than other circuits employ, and it denied Zater leave to pursue these claims in the first instance in the district court. This is made even more egregious since these gatekeeping denials are non-appealable, even if clearly erroneous.

Zater is now forced to resort to this extraordinary writ to correct these fallacious rulings. And if this Court denies Zater discretionary review, the result would be that the Fourth Circuit's cumulation of errors will collude to suspend habeas corpus review for Zater in violation of the Suspension Clause, leaving him to serve an unconstitutional sentence significantly greater than the statutory maximum.

Argument

I. Exceptional Circumstances Warranting Issuance of a Writ of Habeas Corpus

(a) Proper Gatekeeping Threshold:

While a federal inmate may file one §2255 motion after his judgment of conviction has become final, 28 U.S.C. §2255(a), he must obtain prefiling authorization from "a panel of the appropriate court of appeals before presenting a second or successive motion." 28 U.S.C. §2255(h); see also Rules Governing §2255 Proceedings, Rule 9. This "gatekeeping" procedure for screening second or successive federal habeas corpus petitions was instituted by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Henry v Spearman, 2018 U.S.App.LEXIS 21701 (9th Cir. Aug. 6, 2018).

Section 2255 provides that a "second or successive motion must be certified as provided in §2244 ... to contain a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Id. Under this procedure, the appropriate court of appeals may authorize the filing of a second or successive application only if it "makes a prima facie showing that the application satisfies the requirements of [§2244]." 28 U.S.C. §2244(b)(3)(C); see also In re Holladay, 331 F.3d 1169, 1173 (11th Cir. 2003). "[T]he merits [of the appeal] are not relevant to whether [an applicant] can obtain permission to bring a second or successive §2255 motion to vacate." In re Joshua, 224 F.3d 1281, 1282 n.2 (11th Cir. 2000). This is because when determining whether a prima facie showing has been met under §2244, "the stringent [30-day] time limit thus suggests that the court of appeals do not have to engage in the difficult analysis." Tyler v Cain, 533 U.S. 656, 664 (2001). At this stage, making such a prima facie showing is only supposed to impose upon the petitioner a "light burden," In re Hoffner, 870 F.3d 301, 307 (3d Cir. 2017), which consists of "a showing of **possbile** merit to warrant a fuller exploration by

the district court." Cooper v Woodford, 358 F.3d 1117, 1119 (9th Cir. 2004)(en banc).

Only one month after the enactment of AEDPA, three Supreme Court Justices filed a concurrence warning in Felker v Turpin, 518 U.S. 651 (1996), holding that "the question whether the [§2244] statute exceeded Congress' Exceptions Clause power" would have to be revisited via habeas corpus "if the courts of appeals adopted divergent interpretations of the gatekeeper standard." Id. at 666-667.

Since Johnson and Dimaya have been decided, the courts of appeals have had thousands of applications for authorization to file second or successive ("SOS") §2255 motions. The bulk of these applications were filed using standardized fill-in-the-blank forms, most of which prohibit attachments. Almost all cases had no briefing by either the petitioner or the government. See, e.g., In re McCall, 826 F.3d 1308, 1312 (11th Cir. 2016)(Martin, J., Concurring)(applications "are typically based on nothing more than a form filled out by a prisoner, with no involvement from a lawyer"). As one might expect given the volume of the applications, the orders dispensing with these §2244 applications have been both inconsistent and questioned for their legal correctness and thoroughness. Several judges have been troubled by how wrong many of their SOS rulings have been. See, e.g., In re Clayton, 829 F.3d 1254, 1264-66 (11th Cir. 2016)(Jill Pryor, J., concurring)("Since the Supreme Court decided in Johnson [and Dimaya] that this language is unconstitutionally vague, we have repeatedly misinterpreted and misapplied that decision.... In throwing up these sort of barriers [to successive §2255 motions], this Court consistently got it wrong"); and id. (Martin, J., concurring)("A court of appeals is simply not equipped to construct a new basis for a prisoner's old sentence" within 30 days and "our work on these cases would be both less frantic and more accurate" without that deadline).

Some courts of appeals have simply been rubber stamping

§2244 applications and granting leave to file SOS motions if it appears there is any basis of Johnson's applicability. See, e.g., In re Gross, 2016 U.S.App.LEXIS 12314 (D.C. Cir. July 1, 2016)(petitioner has made a prima facie showing that Johnson applies to §924(c)). While other circuits have taken a divergent, stricter reviewing standard than the §2244 gatekeeping threshold allows. See Clayton, supra ("we have been doing far more than what the [§2244] statute directs"). These harsher circuits have adopted views like that in In re Vassell, 751 F.3d 267, 269 (4th Cir. 2014)(holding that §2244 "makes such a [prima facie] showing **necessary**, but it does not provide that such a showing is **sufficient** for receiving pre-filing authorization")(emphasis in original), and In re Leonard, 655 Fed. Appx. 765, 767 (11th Cir. 2016)(holding "it is not enough for a federal prisoner to simply" meet the prima facie threshold identified in the §2244 statute).

Compare In re Hoffner, 870 F.3d at 309 (whether the new rule "substantiates the movant's claim"), with In re Williams, 759 F.3d 66, 72 (D.C. Cir. 2014)("[W]hether the new rule...extends to a prisoner...goes to the merits of the motion and is for the district court, not the court of appeals").

Given that divergent interpretations have clearly developed on the proper gatekeeping threshold, this Court should intervene to "exercis[e] its general supervisory control over the federal court system." Connor, supra at 624. Otherwise, some circuits like Zater's will continue to "comb through sealed records from the original sentencing hearing ... to make a decision about whether the prisoner will win if we let him file his §2255 motion in the district court," which amounts to "decid[ing] the merits" of the cases at this preliminary stage. Clayton, supra. And this "harsh view of our §2244 gatekeeping role brings us perilously close to the suspension of the [habeas corpus] writ." Id.

(b) Non-Appealable Nature of §2244

Compounding the gravamen in this case is the fact that §2244 denials "shall not be appealable and shall not be the subject of a petition for rehearing or for writ of certiorari." 28 U.S.C. §2244(b)(3)(E), even if the denial was made in error. See In re Bradford, 830 F.3d 1273, 1276 (11th Cir. 2016)("when we deny an [SOS] application, that prisoner gets no further consideration of his sentence" because of its non-appealable nature).

Thus, the fact that Zater has a valid issue in circuits other than his own, which factor alone should of been sufficient to satisfy the prima facie threshold of §2244, yet the Fourth Circuit nevertheless denies him leave without explanation, combined with the non-appealable nature of §2244, colludes to suspend Zater's habeas corpus constitutional rights in violation of the Suspension Clause. See Article I, Section 9, Clause 2 of the United States Constitution. This is especially egregious because "habeas corpus plays a vital role in protecting constitutional rights." McQuiggin v Perkins, 185 L.Ed.2d 1019, 1034 (2013).

(c) Incorrect "Statute of Conviction" Applied

The Fourth Circuit also utilized an incorrect factual basis when it denied Zater's §2244 applications.

Zater's §924(c) convictions utilize the "categorical approach" to determine if the substantive conviction qualifies as a "crime of violence." See United States v Fuertes, 805 F.3d 485 (4th Cir. 2015). As this Court held in Montcrieffe v Holder, 133 S.Ct. 1678, 1697 (2013), pursuant to the categorical approach, only the elements of the "statute of **conviction**" may be considered, not the defendant's conduct underlying the **offense**. See also Etienne v Lynch, 813 F.3d 135, 142 (4th Cir. 2015).

Zater's only substantive statute of **conviction** was for

conspiracy to commit bank robbery pursuant to §371. See Sentencing Transcripts, page 119. All of Zater's §2113 bank robbery **offenses** were dismissed by the district court at sentencing.

When the Fourth Circuit denied Zater's §2244 applications filed after Johnson, it held "the **offense** of armed bank robbery, in violation of §2113(a)(d), constitutes a 'crime of violence'." See Orders 16-776 & 16-9529. The Fourth Circuit never made reference to Zater's statute of **conviction**, only to the dismissed **offense.**[4] This runs afoul of this Court's holding in Taylor v United States, 495 U.S. 575 (1990). "[I]t would be unnatural to say that the defendant had a conviction for burglary [if he pleads guilty only to possession of burglar's tools]." Johnson v United States, 135 S.Ct. 2551, 2579 (2015)(Alito, J., dissenting). "Even if the Government were able to prove those facts [supporting a burglary offense], if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." Taylor, 495 U.S. at 601-02. Under basic contract law, since Zater pleaded guilty to the lesser conspiracy offense, he should arguably not now be held to the dismissed bank robbery counts.

And when the Fourth Circuit denied Zater's most recent §2244 application filed after Dimaya, it did so without explanation, stating only: "The Court denies the motion." Whereby it can only be concluded that this denial was for the same reasoning as the previous ones.

4/ In contrast, when the Fourth Circuit denied Zater's brother's §2244 applications, they held his "**convictions** for armed bank robbery are crimes of violence" because petitioner's brother was actually convicted of the substantive §2113 counts. See Orders 16-787 & 16-9382. This clearly shows the Fourth Circuit recognized the difference between "conviction" and "offense."

(d) Circuit Splits

Three circuit courts of appeals have concluded that, post-Dimaya, §924(c)'s residual clause is void-for-vagueness. See United States v Salas, 889 F.3d 681, 686 (10th Cir. 2018); United States v Eshetu, 2018 U.S.App.LEXIS 21526 (D.C. Cir. Aug. 3, 2018); and United States v Davis, 2018 WL 4268432 (5th Cir. 2018). The Seventh Circuit came to this same conclusion even before Dimaya in United States v Cardena, 842 F.3d 959, 996 (7th Cir. 2016).

Whereas three other circuits decided to take a different path. In Ovalles v United States, No. 17-10172 (11th Cir. Oct. 4, 2018)(en banc), the Eleventh Circuit recognized that if §924(c)'s residual clause must utilize the categorical approach - as it always has based on its statutory text - then it is doomed. In an effort to save the statute from unconstitutionality under the doctrine of constitutional avoidance, the Eleventh Circuit decided to "hold that §924(c)(3)(B) prescribes a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense." Id. See also United States v Barrett, No. 14-2641 (2d Cir. Sept. 10, 2018); and United States v Douglas, No. 18-1129 (1st Cir. Oct. 12, 2018).

In addition to the circuit courts of appeals producing splits, there are multiple splits amongst the various district courts as well. The majority of district courts in the Ninth Circuit have held that §924(c)(3)(B) is unconstitutionally vague, both before and after Dimaya. See, e.g., United States v Sangalang, 2018 U.S.Dist.LEXIS 93282, 2018 WL 2670412, at *4 (D. Nev. June 4, 2018); United States v Bell, 158 F.Supp.3d 906, 921 (N.D. Cal. 2016); United States v Baires-Reyes, 191 F.Supp.3d 1046, 1053 (N.D. Cal. 2016); United States v Lattanaphom, 159 F.Supp.3d 1157, 1164 (E.D. Cal. 2016); United States v Bustos, 2016 U.S.Dist.LEXIS 159791, 2016 WL 6821853, at *5 (E.D. Cal. Nov. 17, 2016); and United States v Smith, 215 F.Supp.3d 1026,

1035 (D. Nev. 2016).

Yet a cluster of district courts in the Southern District of California reached the opposite conclusion before this Court issued Dimaya. See, e.g., United States v Tavarez-Alvarez, 2017 U.S.Dist.LEXIS 108228, 2017 WL 2972460, at *4 (S.D. Cal. July 11, 2017); United States v Lott, 2017 U.S.Dist.LEXIS 19497, 2017 WL 553467, at *3 (S.D. Cal. Feb. 9, 2017); and Hernandez v United States, 2016 U.S.Dist.LEXIS 184032, 2016 WL 7250676, at *3 (S.D. Cal. Nov. 8, 2016).

The picture of district courts outside of the Ninth Circuit is even more varied. Compare, e.g., United States v Herr, 2016 U.S.Dist.LEXIS 144201, 2016 WL 6090714, at *3 (D. Mass. Oct. 18, 2016)(finding §924(c)(3)(B) unconstitutionally vague), and United States v Edmundson, 153 F.Supp.3d 857, 864 (D. Md. 2015)(same), with United States v Green, 2016 U.S.Dist.LEXIS 7437, 2016 WL 277982, at *5 (D. Md. Jan. 22, 2016)(finding §924(c)(3)(B) not unconstitutionally vague), and United States v Tsarnaev, 157 F.Supp.3d 57, 74 (D. Mass. 2016)(same).

More recently, there are district courts that seem to be mirroring the splits between the circuit courts of appeals. Compare, e.g., United States v Thanh, 2018 U.S.Dist.LEXIS 142109 (N.D. Cal. Aug. 20, 2018)(holding §924(c)(3)(B)'s text mandates the use of the categorical approach, and §924(c)(3)(B) is unconstitutional); with Royer v United States, 2018 U.S.Dist.LEXIS 130299 (E.D. Va. Aug. 2, 2018)("the text of §924(c)(3)(B) can be fairly read to support either the ordinary-case or the conduct-specific approach; however, ... the doctrine of constitutional avoidance compels the Court to reinterpret §924(c)(3)(B) as adopting the conduct-specific approach").

"The bedeviling 'modified categorical approach' will continue to spit out intra- and inter-circuit splits and confusion." Almanza-Arenas v Lynch, 815 F.3d 469, 483 (9th Cir. 2016). It is clearly apparent that there is no consensus on the applicability of Johnson nor Dimaya to §924(c)'s residual clause,

and this Court should resolve these splits, particularly in connection with the important §2244 gatekeeping principles designed to permit de novo litigation of the issue at the district court level in the first instance.

II. Is §924(c)'s Residual Clause Void-for-Vagueness post-Dimaya?

(a) Zater's Substantive Conspiracy Conviction

Zater's two §924(c) firearm convictions for using a firearm in relation to a "crime of violence" are void because the "crime of violence" element cannot be satisfied post-Dimaya. Zater's sole predicate conviction of conspiracy (18 U.S.C. §371) does not qualify as a "crime of violence" as a matter of law.

Under §924(c)(3), "crime of violence" is defined as:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and--
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The first clause - §924(c)(3)(A) - is commonly referred to as the force clause. The second clause - §924(c)(3)(B) - is commonly referred to as the residual clause.

Section 371 conspiracy categorically fails to qualify as a "crime of violence" under the force clause because the statutory definitions of §371 do not require as an element "the use, attempted use, or threatened use of physical force." See §924(c)(3)(A).

The plain language of 18 U.S.C. §371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Section 371's elements are thus: "1) an agreement by two or more persons to perform some illegal act, 2) willing participation by the defendant, and 3) an overt act in furtherance of the conspiracy." United States v Khan, 309 F.Supp. 2d 789, 818 (E.D. Va. 2004). The statute defines an overt act as "any act to effect the object of the conspiracy." 18 U.S.C. §371. The Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2010, Special Instruction No. 13.1 states: "An 'overt act' is any transaction or event, even one that might be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy." Id. See also United States v Lange, 2016 U.S.App.LEXIS 14929 (2d Cir. Feb. 17, 2016).

Because the elements of §371 do not entail the requisite "use, attempted use, or threatened use, of [violent] physical force," Johnson v United States, 559 U.S. 133, 142 (2010), there are numerous means to violate that statute in a non-violent manner. See United States v Naughton, 621 Fed. Appx. 170, 178 (4th Cir. 2015). For example, the Southern District of New York found an attorney guilty of violation §371 for non-violent actions in United States v Sattar, 395 F.Supp.2d 79, 104 (S.D.N.Y 2005). Because §371's overt act requirement does not mention violence by its terms, it also does not require violence to be infringed. Naughton, supra at 178. "After Descamps, when a statute defines an offense using a single, indivisible set of elements that allows for both violent and nonviolent means of commission, the offense is not a categorical crime of violence." United States v Fuertes, 805 F.3d 485, 498 (4th Cir. 2015).

Furthermore, whether the object of the conspiracy was

itself a violent act has no bearing on whether the conspiracy statute is a "crime of violence." Edmundson, 2015 WL 9582736, at *2 n.2. See also United States v Whitson, 597 F.3d 1218, 1223 (11th Cir. 2010)(rejecting the White analysis, explaining that "the Begay[5] analysis require [the court] to separate [the conspiracy and its target offense] and to examine **the conspiracy alone**")(emphasis in original). See, e.g., United States v Castillo, 2016 U.S.Dist.LEXIS 58265 (D. N.Mex. May 2, 2016) (holding "conspiracy to commit robbery ... does not constitute a crime of violence under either the force or residual clauses of Section 924(c)(3) ... even though the object of the conspiracy itself is a crime of violence").

(b) Categorical vs Conduct-Based Approach

Section 371 conspiracy also does not qualify as a crime of violence under §924(c)(3)'s residual clause. The residual clauses in §924(c)(3)(B) and §16(b) are identical. The fate of one is the fate of the other. And this Court's proclamation in Dimaya that §16(b) is unconstitutional confirms once and for all that §924(c)'s residual clause is also unconstitutionally vague.

The words of a statute are the beginning, and often the end, of any legal puzzle.[6] Both §16(b) and §924(c)(3)(B) define a crime of violence in precisely the same way: An "offense that is a felony and ... that **by its nature**, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

In Dimaya, this Court held that this language in §16(b) is void for vagueness. This Court declared that "Johnson is a straightforward decision, with equally straightforward applica-

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5/ Begay v United States, 553 U.S. 137, 128 S.Ct. 1581 (2008).

6/ The Supremacy-of-Text Principle provides that "the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, READING LAW at 56 (Thompson /West 2012).

tion here." Id. at 1213. "To begin where Johnson did [with the ACCA], §16(b) also calls for a court to identify a crime's 'ordinary case' in order to measure the crime's risk." Id. at 1215. And these features rendered §16(b) just as flawed as the ACCA's residual clause. Id. Dimaya fielded countless objections by the government and the dissenting justices and dispatched each. The Court was heavily persuaded by the fact that the texts of §16(b) and the ACCA's residual clause included only minor, inconsequential differences.

As closely matched as §16(b) was to the ACCA's text, it is identical to §924(c)(3)(B). "[T]he same words or phrases are presumed to have the same meaning." Prieto-Romero v Clark, 534 F.3d 1053, 1061 (9th Cir. 2008). Certainly at least two dissenting members of the Dimaya Court believed so. Justice Thomas recognized in his opening paragraph that "the Court jettisons Johnson's assurance that its holding would not jeopardize 'dozens of federal and state criminal laws.'" Id. at 1242. And Chief Justice Roberts predicted that Dimaya may doom §924(c)'s residual clause: "Of special concern, §16(b) is replicated in the definition of 'crime of violence' applicable to §924(c)." Id. at 1241. And thus "the Court's holding calls into question convictions under [§924(c),] what the Government warns us is an 'oft-prosecuted offense.'" Id. Not only does Dimaya "call into question" the viability of §924(c)'s residual clause, it seals the statute's fate. Indeed, immediately after Dimaya, three circuit courts of appeals ruled such. See Salas, Eshetu, and Davis, supra. And a fourth circuit ruled such even before Dimaya. See Cardena, supra.

Whereas three different circuits have decided to reinterpret these two identical statutory texts to have two different meanings. Utilizing the newly-made "conduct-based" approach, these circuits hold that §924(c)(3)(B) can be salvaged by the "nexus" between a firearm and the purported crime of violence or because the companion offense is "contemporaneous"

with the possession or use of the firearm.

"The required nexus does not change the fact that §924(c) possesses the same two features that rendered both ACCA and §16(b)'s residual clauses unconstitutionally vague: an ordinary-case requirement and an ill-defined risk threshold." Salas, 889 F.3d at 685. Therefore, "[r]equiring a sufficient nexus to a firearm does not remedy those two flaws." Id.

Even though the ACCA and §16(b) are recidivist statutes that look backward to measure past convictions in other courts, while §924(c)'s underlying offense is "contemporaneous" with the firearm crime, this also does not justify disparate treatments of these statutes. "[I]n the context of crime of violence determinations under §924(c), our categorical approach applies regardless of whether we review a current or prior crime." United States v Piccolo, 441 F.3d 1084, 1086-87 (9th Cir. 2006).

The text is the only filter that matters. It matters not **when** a predicate offense occurred, but only **whether** that predicate offense, "by its nature," presents the risk targeted by the residual clause. More fundamentally, §924(c)(3)(B)'s use of "by its nature" creates a clear directive that the categorical approach is proper. As this Court stated in Leocal v Ashcroft, 543 U.S. 1, 7 (2004), "this ['by its nature'] language requres us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime." Id. We must apply the categorical approach, said this Court, because the words of the statute tell us so. See James v United States, 550 U.S. 192, 208 (2007)(indicating that the words "by its nature" require the application of the categorical approach); and Dimaya, 138 S.Ct. at 1217-18 (the phrase "by its nature" makes clear that the statute "tells courts to figure out what an offense normally - or ... 'ordinarily' - entails, not what happened to occur on one occasion").

This Court's analysis is supported by common usage and legal parlance, which define an offense's "nature" by its "normal

and characteristic quality." Webster's Third New International Dictionary 1507 (2002); see also Black's Law Dictionary 1127 (9th ed. 2009)(defining "nature" as "a fundamental quality that distinguishes one thing from another; the essence of something"). This focus on ordinary or usual qualities demands the categorical approach. That command becomes even stronger in light of the fact that the statute does not merely reference the offense's **nature**, but instead focuses on whether the offense "by its nature" has a particular quality. The phrase "by its nature" is regularly understood to mean that "things of that type always have that characteristic." By its nature, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/by-its-nature (last visited August 20, 2018).

In Taylor v United States, 495 U.S. 575 (1990), this Court revealed that Congress always intended that the categorical approach apply to §924(c)(3). This Court said so while surveying the legislative history of the ACCA. Id. at 581-88. In fact, "if Congress had wanted judges to look into a felon's actual conduct, it presumably would have said so; other statutes, in other contexts, speak in just that way." Id. That same remark well describes §924(c)(3)(B), which includes no more case-specific language than does its doppelganger, §16(b). Congress could have written language into §924(c)(3)(B) directing a court to measure **these** facts of **this very** crime of violence, but it did not. See, e.g., United States v David H, 29 F.3d 489, 494 (9th Cir. 1994) ("had Congress intended a case-by-case inquiry into whether the felony as committed constituted a crime of violence, there would have been no need for the phrase 'by its nature'").

Courts generally avoid interpretations that render statutory language meaningless. United States v Jicarilla Apache Nation, 564 U.S. 162, 185 (2011). And by adopting the Eleventh Circuit's conduct-based approach towards §924(c)'s residual clause, this would render its phrase "by its nature" meaningless. Therefore, a court must employ the categorical approach to an

offense under this provision "no matter how clear from the record that the defendant committed a crime of violence." United States v Martin, 215 F.3d 470, 474 (4th Cir. 2000). The contemporaneous-crime query under §924(c) demands the same categorical filter as the others, and it is to be applied only to the elements of the "statute of conviction," id., not to any dismissed conduct, as that would be looking to the "particular facts relating to the petitioner's crime." Leocal, supra.

(c) Retroactivity of Dimaya

The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in Teague v Lane, 489 U.S. 288 (1989). Under Teague, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. Teague and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew substantive rules generally apply retroactively." Schriro v Summerlin, 542 U.S. 348, 351 (2004); see Montgomery v Louisiana, 577 U.S. --- (2016). Second, new "watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding" will also have retroactive effect. Saffle v Parks, 494 U.S. 484, 495 (1990).

Dimaya did not fall within the limited second category; it fell into the first - substantive. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id. at 351-352.

Under this framework, the rule announced in Dimaya is substantive. By striking down the residual clause as void for

vagueness, Dimaya changed the substantive reach of §16(b), and thereby its identically-worded cousin §924(c), altering "the range of conduct or the class of persons that the [statute] punishes." Schriro, 542 U.S. at 353. Before Dimaya, §924(c) applied a mandatory consecutive sentence for any person who possessed, used or discharged a firearm during a crime of violence, even if the predicate crime of violence fell only under the residual clause. An offender in that situation faced an additional 5, 7, or 10 years consecutively added to their sentence. After Dimaya, the same person engaging in the same conduct is no longer subject to the consecutive sentence. The residual clause is invalid under Dimaya, so it can no longer mandate or authorize any sentence. In other words, Dimaya establishes that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. United States v U.S. Coin & Currency, 401 U.S. 715, 724 (1971). It follows that Dimaya is a substantive decision.

Dimaya affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied. Dimaya struck down part of a criminal statute that regulates conduct and prescribes punishment. It thereby altered "the range of conduct or the class of persons that the law punishes." Schriro, 542 U.S. at 353. Dimaya is thus a substantive decision and so has retroactive effect under Teague in cases on collateral review.

Of significant import to cases at the §2244 stage, that a new rule is "made retroactive ... by the Supreme Court," this can be accomplished in one of two ways:

> "The clearest instance, of course, in which we can be said to have 'made' a new rule retroactive is where we expressly have held the new rule to be retroactive in a case on collateral review and applied the rule to that case. But, as the Court recognizes, a single case that expressly holds a rule to be retroactive is not a sine qua non for the satisfaction of this statutory provision. This Court instead may 'make' a new rule retroactive through multiple holdings that

> logically dictate the retroactivity of the new rule. To apply th[is] syllogistic relationship..., if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have 'made' the given rule retroactive to cases on collateral review...within the meaning of §2244(b)(2)(A)..."

Tyler v Cain, 533 U.S. 656, 668-69 (2001)(O'Connor, J., concur).

"Several courts of appeal have adopted Justice O'Connor's Tyler analysis to determine whether a recent decision by the Supreme Court satisfies the standards for authorization under §2255(h)(2)." Price v United States, 795 F.3d 731, 734 (7th Cir. 2015). See also In re Watkins, 810 F.3d 375 (6th Cir. 2015) (agrees with Price); Hughes v United States, 770 F.3d 814, 817 (9th Cir. 2014)("The Court can establish that a holding applies retroactively either expressly or through the combination of the holdings from multiple cases"); and In re Henry, 757 F.3d 1151, 1160 (11th Cir. 2014)("like our sister circuit courts, we have recognized 'retroactivity by logical necessity'").

Applying the "multiple holdings" aspect of Tyler to the instant matter, it is clear that this Court "made" its holding in Dimaya retroactive for the purposes of §2244(b)(2)(A). Case One in this instance would be this Court's directive in Welch v United States, 136 S.Ct. 1257 (2016), which stated that any new rule that invalidates a criminal statute on vagueness grounds, thereby altering the statutory sentences and the amount of time a defendant can serve, can only be a substantive rule that applies retroactively. Case Two in this instance would be the Dimaya holding, which is of the particular type announced in Welch, since it invalidated a different statute for the same reasoning. Since this Court's "holdings logically permit no other conclusion than that the rule is retroactive," Tyler, 533 U.S. at 669, then this Court "can be said to have 'made' [Dimaya] retroactive within the meaning of §2244(b)(2)(A)." Id.

(d) Zater's Guilty Plea

Although "a guilty plea does implicitly waive some claims, including some constitutional claims," it "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." Class v United States, 138 S.Ct. 798, 804-05 (2018). See also United States v St. Hubert, 883 F.3d 1319, 1324 (11th Cir. 2018)("guilty plea does not bar his claim that his statute of conviction is unconstitutional," permitting a §924(c) residual clause challenge); and United States v Bacon, 884 F.3d 605, 610 (6th Cir. 2018)(guilty plea does not bar challenges to the Government's power to criminalize defendant's admitted conduct).

Conclusion

As this Court has recognized, §924(c)(3)(B) "is not a model of the careful drafter's art." United States v Hayes, 555 U.S. 415, 429 (2009). Therefore, "when an inmate's sentence may have been predicated on application of the now-void residual clause ... the inmate 'relies on' a new rule of constitutional law within the meaning of 28 U.S.C. §2244(b)(2)(A)." United States v Winston, 850 F.3d 677, 682 (4th Cir. 2017). Further, multiple holdings by this Court logically dictated that the new substantive rule announced in Dimaya was retroactive, utilizing the plurality opinion of Tyler v Cain, 533 U.S. 656, 668-69 (2001). Last, this new retroactive rule was previously unavailable as it was announced after Zater's conviction, direct appeal, and first §2255 were completed.

Accordingly, Zater met the relatively low bar of the prima facie threshold, and the disagreement amongst the various courts of appeals on §924(c)'s residual clause equates to a sufficient showing of **possible** merit to warrant a fuller exploration by the district court.

The Fourth Circuit's denial of Zater's §2244 application despite these self-evident truths creates exceptional circum-

stances warranting an exercise of this Court's supervisory powers. Therefore, Zater respectfully requests that the petition as set forth and described above, be in all things GRANTED, or for such other and further relief as this Court deems appropriate.

Respectfully submitted,

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30 day of October, 2018