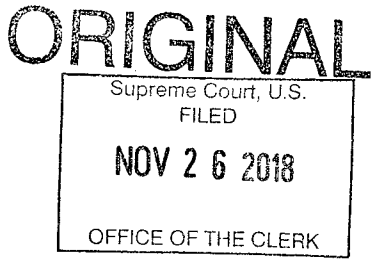
18-7022

No. 18-____

IN THE

SUPREME COURT OF THE UNITED STATES



RYAN LEE ZATER,
Petitioner,

vs.

WARDEN, F.C.I. MIAMI LOW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Pro se

26 day of November, 2018

Question Presented for Review

The Fourth Circuit recently held: "The Supreme Court should hear this case in a timely fashion to resolve the conflict separating the circuit courts of appeal nationwide on the proper scope of the §2255(e) saving clause so that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results in this important area of law." United States v Wheeler, 2018 U.S. App. LEXIS 15753 (4th Cir. June 11, 2018). The clarion call issued on this Court was in response to the Fourth Circuit's holding in a previous iteration of the same case: United States v Wheeler, 886 F.3d 415, 428 (4th Cir. 2018)("§2255(e) must provide an avenue for prisoners to test the legality of their sentences pursuant to §2241, ... as well as undermined convictions").

Yet the Eleventh Circuit reads "the saving clause of §2255(e)" much more narrowly. See McCarthan v Dir. of Goodwill Indus-Suncoast, Inc, 851 F.3d 1076 (11th Cir. 2017)(en banc) (holding that claims of actual innocence, being sentenced over the statutory maximum, and being sentenced for a non-existent offense can **no longer** be brought pursuant to the saving clause; the saving clause may only be satisfied under the limited circumstances when the sentencing court no longer exists, or a prisoner's claim concerns "the execution of his sentence"). /1

Although Zater was convicted in the Fourth Circuit, he is statutorily mandated to file a saving clause petition in his district of confinement, which is in the Eleventh Circuit. Zater would have received relief in his district of conviction, but he cannot receive relief in his district of confinement, due to this circuit split that has developed.

The Question Presented is:

What is the scope of the §2255(e) saving clause? And is it permissible for Zater to proceed thereunder?

1/ The remaining circuits have entrenched this split as well. See infra.

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Citation of Lower Court Decisions

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

Appendix A (Direct Appeal)
United States v Zater,
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Appendix B (Initial §2255)
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No. 17-21199-CIV-Williams (S.D. Fla. March 16, 2018)
No. 18-11250-JJ (11th Cir. Oct. 17, 2018)

Controlling Constitutional Provisions, Statutes & Rules

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

Article 3, Clause 2 of the United States 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 United States Constitution provides in part: "...without due process of law..."

Title 28, United States Code, Section 2255(e) provides: "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, **unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.**"

IN THE

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RYAN LEE ZATER,
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Respondent.

PETITION FOR WRIT OF CERTIORARI

Jurisdictional Statement

This is an appeal of a final order issued by the United States Court of Appeals for the Eleventh Circuit on October 17, 2018, denying Zater's §2255(e) saving clause application for habeas corpus relief, filed pursuant to 28 U.S.C. §2241.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 10.

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 United States District Court, 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.

Zater filed two §2244 applications seeking permission to file a second §2255 in light of this Court's Johnson/Welch combo, yet both were quickly denied. 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).

Thereafter, Zater moved this Court for a Writ of Mandamus seeking to have it review the Fourth Circuit's denials of Zater's §2244 applications. This Court denied discretionary review on February 17, 2017. See In re Zater, 137 S.Ct. 1082 (2017).

Even though Zater was convicted in the Fourth Circuit, on March 31, 2017, he filed a §2255(e) saving clause petition in the Southern District of Florida's District Court, since he is confined there. It was denied on March 16, 2018. See Zater v Romero, 2018 U.S.Dist.LEXIS 44486 (S.D. Fla. Mar. 16, 2018). A timely notice of appeal was filed.

While Zater's §2241 was pending in the Eleventh Circuit, this Court issued its Dimaya decision and multiple circuit courts of appeals 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. This application was denied without explanation by the Fourth Circuit's clerk on September 18, 2018. See In re Zater, No. 18-340 (4th Cir. Sept. 18, 2018)(unpublished).

Currently pending before this Court is an original action under §2241 habeas corpus, appealing the denial of Zater's §2244 Dimaya application, based on the divergent gatekeeping protocols that have developed. See In re Zater, 18-6675 (S.Ct. Nov. 13, 2018).

After filing the §2241 habeas corpus motion with this Court, the Eleventh Circuit denied Zater's §2255(e) saving clause petition on October 17, 2018. This appeal ensues seriatim.

Preliminary Statement

Zater's sole substantive conviction is for a single §371 conspiracy, for which he received a five year sentence. Yet that sentence was increased by a factor of eight to 37 years for two §924(c) convictions. Coupling this Court's Dimaya holding with the numerous circuit courts of appeals holdings applying Dimaya, §371 conspiracy can no longer qualify as a crime of violence under §924(c)'s residual clause, as it is void-for-vagueness if using the categorical approach. And §371 conspiracy has never been able to qualify under §924(c)'s force clause, because it does not have the requisite violent physical force as an element thereof. Therefore, there is a meritorious argument that Zater is actually innocent of his two §924(c) convictions because the crime of violence element cannot be met, and he is serving a sentence decades longer than his statutory maximum permits.

Had Zater been confined within the boundaries of where he was convicted - the Fourth Circuit - he would have been permitted to bring a §2255(e) saving clause petition under the dictates of Wheeler to correct this miscarriage of justice. Yet since the Federal Bureau of Prisons houses Zater within the Eleventh Circuit, the McCarthan rationale disallows §2255(e) saving clause petitions in these circumstances. This is due to a circuit split that has developed on the interpretation of the saving clause's text, for which no two circuits can seem to agree exactly.

The role of §2255(e)'s saving clause needs to be defined and clarified under today's jurisprudence to provide a consistent result within constitutional parameters. And since "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law,"[2] the saving clause should be permitted to correct the fundamental sentencing defect in Zater's case.

2/ Boumediene v Bush, 553 U.S. 723, 779, 128 S.Ct. 2229 (2008).

Argument

What is the scope of §2255(e)'s saving clause? And is it permissible for Zater to proceed thereunder?

Section 2255(e) provides a means for petitioners to apply for a traditional writ of habeas corpus pursuant to §2241. It states:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. §2255(e). See Boumediene v Bush, 553 U.S. at 776 ("the statute at issue had a saving clause, providing that a writ of habeas corpus would be available if the alternative process proved inadequate or ineffective").

(a) the Fourth Circuit's view:

First, the Fourth Circuit held "that the savings clause is a jurisdictional provision." Wheeler, 886 F.3d at 423. And that "if a petitioner cannot satisfy the savings clause requirements, his or her §2241 petition must be dismissed for lack of jurisdiction." Id.

After settling the jurisdiction issue, the Fourth Circuit reconfirmed the test laid out in In re Jones, 226 F.3d 328 (4th Cir. 2000), holding:

> §2255 is inadequate and ineffective to test the legality of a **conviction** when: (1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first §2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of §2255(h).

Id. at 333-34. Jones added: "courts [allowing §2241 review] have focused on the more **fundamental defect** presented by a situation

in which an individual is incarcerated for conduct that is not criminal but, through no fault of his own, has no source of redress." Id. at 333 n.3 (emphasis added).

In addition to the undermined **convictions** that the Jones test permitted saving clause review, the Fourth Circuit extended its holding "to fundamental **sentencing** errors as well." Wheeler, 886 F.3d at 428. In making this decision, the Fourth Circuit analyzed the text of the saving clause statute, holding: "Including sentencing errors within the ambit of the savings clause also finds support in the statutory language." Wheeler, 886 F.3d at 427. The saving clause pertains to one's "detention," and Congress deliberately did not use the word "conviction" or "offense" as it did elsewhere in §2255. See 28 U.S.C. §2255(h)(1)(referencing "the offense"); and §2255(f)(1) (referencing "conviction"). See Russello v United States, 464 U.S. 16, 23, 104 S.Ct. 296 (1983)("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). "Detention", they held, necessarily implies imprisonment. See Zadvydas v Davis, 533 U.S. 678, 690, 121 S.Ct. 2491 (2001)("Freedom from imprisonment [is freedom] from government custody, **detention**, or other forms of physical restraint"). Thus, "the text of the savings clause does not limit its scope to testing the legality of the underlying criminal conviction." Wheeler, 886 F.3d at 428 (citing Brown v Caraway, 719 F.3d 583, 588 (7th Cir. 2013)).

The court's new savings clause test for erroneous **sentences** based on these determinations is:

> §2255 is inadequate or ineffective to test the legality of a **sentence** when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first §2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on

> collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of §2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.

Wheeler, 886 F.3d 429.

(b) the Eleventh Circuit's view:

First, the Eleventh Circuit quibbled over the term "saving" versus "savings" when referencing the clause. See McCarthan, 851 F.3d at 1081-82 ("saving, not savings, is the precise word" for "a statutory provision exempting from coverage something that would otherwise be included" (citing Bryan A. Garner, Garner's Dictionary of Legal Usage 797 (3d ed. 2011)).

Second, the Eleventh Circuit came to the same conclusion as the Fourth Circuit insofar as to the jurisdictional limit on §2241 habeas petitions. Id. at 1080. See Moore v United States, 717 Fed. Appx. 963 (11th Cir. 2018)("The applicability of the savings clause is a threshold jurisdictional issue").

Then the Eleventh Circuit took the drastic step of overruling nearly two decades worth of circuit precedent, Id. at 1080, 1095-1100, "read[ing] the clause so narrowly" as to provoke "serious question[s] about the constitutionality of the statute." Boumediene v Bush, 553 U.S. 723 (2008).

After analyzing the same "text" of the saving clause, the Eleventh Circuit came to a diametrically opposed conclusion than the Fourth Circuit. "When we read this text, several terms offer important clues about its meaning: 'remedy,' 'to test,' 'inadequate or ineffective,' and 'detention.'" McCarthan, 851 F.3d at 1085.

> "Remedy" as used in the saving clause does not promise "relief." A "remedy" is "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated." Remedy, Black's Law Dictionary 1526 (3d ed. 1933). "Relief" is "the assistance, redress, or benefit which a complainant seeks at the hands of the court." Relief, Black's Law

> Dictionary 1523 (3d ed. 1933). "To test" the legality of his detention and satisfy the saving clause, a prisoner is not required "to win" his release. "To test" means "to try." Test, 11 Oxford English Dictionary 220 (1st ed. 1933). The term "inadequate," as defined in the phrase "inadequate remedy at law," means "unfitted or not adapted to the end in view." Inadequate Remedy at Law, Black's Law Dictionary 940 (3d ed. 1933). And "ineffective" means "[o]f such a nature as not to produce...the intended [] effect." Ineffective, 5 Oxford English Dictionary 239 (1st ed. 1933). The word "or" in "inadequate or ineffective" commonly introduces a synonym or "definitional equivalent." See Antonin Scalia & Bryan A. Garner, Reading Law: An Interpretation of Legal Texts 122 (2012). The term "detention" carries a broader meaning than the term "sentence" that appears elsewhere in the statute. When Congress enacted section 2255, the word "detention" meant "[k]eeping in custody or confinement," Detention, 3 Oxford English Dictionary 266 (1st ed. 1933), or "[t]he act of keeping back or withholding, either accidentally or by design, a person or thing." Detention, Black's Law Dictionary 569 (3d ed. 1933).

McCarthan, 851 F.3d at 1086-89.

The Eleventh Circuit's conclusion after review of these terms and the whole text was that (1) "a change in case law does not trigger relief under the saving clause," id. at 1085, (2) nor does a "sentence [that] exceeds the statutory maximum," id., (3) nor can the saving clause be utilized when a prisoner is "in custody despite never having committed a crime," id. at 1111, and (4) it cannot be accessed even if the prisoner is "actually innocent" or sentenced for a "nonexistent offense," id. at 1106, 1111.

The Eleventh Circuit now only allows access to the saving clause "in th[ese] kinds of circumstances: (1) when raising claims challenging the execution of the sentence, such as the deprivation of good-time credits or parole determinations; (2) when the sentencing court is unavailable, such as when the sentencing court itself has been dissolved; or (3) when practical considerations, such as multiple sentencing courts might prevent a petitioner from filing a motion to vacate." Id. at 1092-93.

After McCarthan, to determine whether a prisoner satisfies the saving clause, a court need only analyze "whether the motion to vacate is an adequate procedure to test the prisoner's claim." Id. at 1086. To answer this question, according to the Eleventh Circuit, a court should "ask whether the prisoner would have been permitted to bring that claim in a motion to vacate. In other words, a prisoner has a meaningful opportunity to test his claim whenever section 2255 can provide him a remedy." Id. at 1086-87. In short, when reviewing a Section 2241 petition, courts should look to whether the petitioner's claim is of a kind that is "cognizable" under Section 2255. If so, the petitioner cannot meet the "saving clause" and cannot proceed under Section 2241. To be sure, "the remedy [afforded] by a [Section 2255] motion is not ineffective unless the procedure it provides in incapable of adjudicating the claim." Id. at 1088. Whether the petitioner could obtain relief under Section 2255 is not relevant to the McCarthan test. Thus, the "remedy" that must be "inadequate or ineffective" to trigger the saving clause is "the available process - not substantive relief." Id. at 1086.

(c) the other circuits' views:

The First Circuit believes that the savings clause is only available in "rare and exceptional circumstances, such as those in which strict adherence to [§2255's] gatekeeping provisions would result in a 'complete miscarriage of justice.'" Trenkler v United States, 536 F.3d 85, 99 (1st Cir. 2008). A "miscarriage of justice" is defined as "only those extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." Id.

The Second Circuit believes that the savings clause exists solely "to preserve habeas corpus for federal prisoners in those extraordinary instances where justice demands it." Triestman v United States, 124 F.3d 361, 378 (2d Cir. 1997). Section 2255 is "inadequate or ineffective" only when the failure to allow

collateral review would raise serious constitutional questions because the prisoner "(1) can prove actual innocence on the existing record, and (2) could not have effectively raised his claims of innocence at an earlier time." Id. at 363.

The Third Circuit concludes that the "safety valve" provided under §2255 is extremely narrow and has been held to apply in unusual situations, such as those in which a prisoner has had no prior opportunity to challenge his conviction for a crime later deemed to be non-criminal by an intervening change in law. Okereke v United States, 307 F.3d 117, 120 (3d Cir. 2002).

The Fifth Circuit held that the savings clause of §2255(e) "applies to a claim: (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first §2255 motion." Reyes-Requena v United States, 243 F.3d 893 (5th Cir. 2001).

The Sixth Circuit states that in order to invoke §2255(e)'s savings clause, a petitioner must demonstrate: (1) the existence of a new interpretation of statutory law; (2) issued after the petitioner had sufficient time to incorporate the new interpretation into his direct appeals or subsequent motions; (3) which is retroactive; and (4) which applies to the merits of the petition to make it more likely than not that no reasonable juror would have convicted him. Wooten v Cauley, 677 F.3d 303, 307-08 (6th Cir. 2012).

The Seventh Circuit has explained that, in order to fit within the savings clause, a petitioner must meet three conditions. First, he must show that he relies on a new statutory interpretation case rather than a constitutional case. Second, he must show that he relies on a decision that he could not have invoked in his first §2255 motion and that case must apply retro-

actively. Last, he must demonstrate that there has been a "fundamental defect" in his conviction or sentence that is grave enough to be deemed a miscarriage of justice. Brown v Caraway, 719 F.3d 583, 586 (7th Cir. 2013).

The Eighth Circuit has not yet set the exact contours of §2255(e)'s savings clause, although they have held that it applies very narrowly, and that the petitioner must show that he "had no earlier procedural opportunity to present his claims." Abdullah v Hedrick, 392 F.3d 957, 963 (8th Cir. 2004).

The Ninth Circuit held that a petitioner may proceed under §2241 pursuant to the savings clause when he "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." Stephens v Herrera, 464 F.3d 895, 898 (9th Cir. 2006). With respect to the first requirement, "[t]o establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not no reasonable juror would have convicted him." Id. With respect to the second requirement, the Court considers "(1) whether the legal basis for petitioner's claim did not arise until after he had exhausted his direct appeal and first §2255 motion, and (2) whether the law changed in any way relevant to petitioner's claim after that first §2255 motion." Harrison v Ollison, 519 F.3d 952, 960 (9th Cir. 2008).

The Tenth Circuit held that "[t]o invoke the savings clause, there must be something about the initial §2255 procedure that **itself** is inadequate or ineffective for **testing** a challenge to detention." Prost v Anderson, 636 F.3d 578, 589 (10th Cir. 2011). Although the Tenth Circuit is in alignment with the Eleventh on this issue, the Tenth Circuit did leave "these constitutional questions" open: (1) "Whether the savings clause may be used...to avoid serious constitutional questions arising from application of §2255(h)," and (2) "whether, when, and how the application of §2255(h)'s limits on second or successive motions might (ever) raise a serious constitutional question." Id. at 594.

(d) saving clause as applied to Zater:

Even though there is no clear consensus on the scope and applicability of §2255(e)'s saving clause, the general consensus of the vast majority of circuits agree that it can be accessed when two caveats are met: actual innocence coupled with some hindrance from bringing that actual innocence claim in an earlier proceeding. These two caveats are met in Zater's case.

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.

(i)

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."

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 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.

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)(because §371's overt act requirement does not mention violence by its terms, it also does not require violence to be infringed). "[W]hen 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." See United States v Whitson, 597 F.3d 1218, 1223 (11th Cir. 2010)(explaining that the court is "required to separate [the conspiracy and its target offense] and to examine **the conspiracy alone**").

(ii)

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. And this Court's proclamation in Dimaya that §16(b) is unconstitutional confirms that §924(c)'s residual clause is also unconstitutional.

The words of a statute are the beginning, and often the end of any legal puzzle.[3] 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 "this ['by its nature'] language requires us to look to the elements and the nature of the offense of conviction, rather than to to particular facts relating to the petitioner's crime." Id. (citing Leocal v Ashcroft, 543 U.S. 1, 7 (2004)). See also 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 the categorical approach mandates the use of a two-step framework "to determine whether a crime is a violent felony." United States v Vivas-Ceja, 808 F.3d 719, 731 (7th Cir. 2015).

> In the first step, the court must determine the kind of conduct that the crime involves in the ordinary case as opposed to the facts on the ground in the defendant's predicate conviction. The second step is also dependant on the ordinary case. Specifically the court must gauge whether that ordinary case of the crime presents a serious potential risk of physical injury.

Vivas-Ceja, 808 F.3d at 731. This Court held that these "two features of the residual clause conspire to make it unconstitutionally vague," Johnson v United States, 135 S.Ct. 2551, 2557 (2015), because "applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." Welch v United States, 136 S.Ct. 1257, 1262 (2016). Thus, the "ordinary case" analysis and statutory provisions that compel such an analytical framework were invalidated by Dimaya.

3/ 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 (2012).

And since §16(b) and §924(c)(3)(B)'s texts are identical, "the same words or phrases are presumed to have the same meaning." Prieto-Romero v Clark, 534 F.3d 1053, 1061 (9th Cir. 2008). Chief Justice Roberts believed so when he recognized that "§16(b) is replicated in the definition of 'crime of violence' applicable to §924(c)," and thus "the Court's holding calls into question convictions under" §924(c) as well. Dimaya, 138 S.Ct. at 1241.

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 United States v Salas, 889 F.3d 681, 686 (10th Cir. 2018); United States v Eshetu, 898 F.3d 36, 37 (D.C. Cir. 2018); and United States v Davis, ___ F.3d ___, 2018 WL 4268432 (5th Cir. Sept. 7, 2018). The Seventh Circuit came to this conclusion even before Dimaya in United States v Cardena, 842 F.3d 959, 996 (7th Cir. 2016).

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." Dimaya, 138 S.Ct. at 1217-18. 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 (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 doppleganger, §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 a "conduct-based" approach towards §924(c)'s residual clause 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 based on the text, 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.

(iii)

At the time of Zater's criminal case, direct appeal, and first §2255, "precedent existing at the time the defendant's conviction became final," Chaidez v United States, 133 S.Ct.

1103, 1107 (2013), precluded Zater's claim in both the Fourth Circuit (where he was sentenced) and in the Eleventh Circuit (where he is confined). "Defendants, clearly, do not dispute that, prior to [Dimaya], the relevant predicate acts, qualified as crimes of violence under §924(c)(3)(B)" -- the so-called residual clause. United States v Dervishaj, 169 F.Supp.3d 339 (E.D.N.Y. 2016). See also United States v Villanueva, 2016 U.S. Dist.LEXIS 108582 (M.D. Fla. AUg. 16, 2016)("conspiracy ... is a crime of violence pursuant to 18 U.S.C. §924(c)(3)(B)"). And both this Court and the Eleventh Circuit before Dimaya rejected that the residual clause was void for vagueness. See James v United States, 550 U.S. 192, 210 n.6 (2007); Sykes v United States, 561 U.S. 1 (2011); and United States v Gandy, 710 F.3d 1234, 1239 (11th Cir. 2013). So had Zater "raised a [Dimaya]-based objection at the time" of his conviction or first appeals, the court would have been "unwilling to listen to his claim, due to the effect of binding circuit precedent, and that a challenge [wa]s squarely foreclosed." Williams v Warden, 713 F.3d 1332, 1343-44 (11th Cir. 2014). Now that "[o]ur contrary holdings in James and Sykes are overruled," Johnson, 135 S.Ct. at 2563, Zater's claims are cognizable and ripe for review. See United States v Jordan, 635 F.3d 1181, 1189 (11th Cir. 2011)("We are bound by prior precedent decisions unless or until we overrule them while sitting en banc, or they are overruled by the Supreme Court").

(iv)

Dimaya was clearly retroactive to cases on collateral review "through multiple holdings that logically dictate[d] the retroactivity of the new rule." Tyler v Cain, 533 U.S. 656, 668-69 (2001)(O'Connor, J., concurring). See also In re Henry, 757 F.3d 1151, 1160 (11th Cir. 2014)("like our sister circuit courts, we have recognized 'retroactivity by logical necessity'").

> 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.

Tyler, 533 U.S. at 669.

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's residual clause 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 ... to cases on collateral review." Id.

Conclusion

Since no reasonable juror would be able to convict Zater today for his two §924(c) convictions, due to the "crime of violence" element unable to be met, he is actually innocent of those offenses and is serving a sentence decades longer than his statutory maximum calls for.

Zater's district of **conviction** would have permitted him to access §2255(e)'s savings clause to address this issue. Yet Zater's district of **confinement** will not allow him to access this same provision due to a circuit split that has developed.

A fundamental defect exists in Zater's conviction and/or sentence, and "the privilege of habeas corpus entitles [him] to a **meaningful** opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." Boumediene, 553 U.S. at 779.

Respectfully submitted,

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