No. 21-6239

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT A. ESPINOZA,

PETITIONER,

vs.

M. SEGAL, WARDEN,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title 18 U.S.C. § 1962(c)'s "racketeering activity" is defined in Title 18 U.S.C. § 1961(1)(A) to include many non-violent offenses including the act of "gambling". Section 1962(c)'s collection of "unlawful debt" is defined in Title 18 U.S.C. § 1961(6)(A)(B) in relevant part, as a debt "(A) incurred or contracted in gambling activity. . . (B) which was incurred in connection with the business of gambling. . . ." The questions are:

(1) Is § 1962(c)'s "Unlawful Debt" an alternative crime with alternative elements or a means of fulfilling the element of racketeering activity, i.e., gambling activity?

(2) Does § 1962(c) RICO qualify as a predicate crime of violence for purposes of conviction under § 924(c)(3)(A)'s elements clause when Congress made § 1959 VICAR as the violent racketeering offense?

(3) Can § 1962(c) RICO sometimes qualify as a crime of violence predicate and sometimes not depending on the facts of the case, for conviction under Title 18 U.S.C. § 924(c)(3)(A)'s elements clause?

(4) Does 18 U.S.C. § 1961(1)(A)'s definition of racketeering activity's use of the term "any act or threat 'involving'" include conspiracy?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

1. Court in question: Seventh Circuit Court of Appeals.
2. Appellate Court No. 21-1466
3. District Court No. 1:21-cv-01019.
4. Criminal Case No. 00-cr-40031.
5. Date of entry of judgment: May 19, 2021.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Robert A. Espinoza, pro se, is not a corporation, therefore, there is no publicly held company owning 10% or more.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, ROBERT A. ESPINOZA, pro se, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Pet. App. A) is unpublished, Case No: 21-1466. The opinion of the United States District Court for the Central District of Illinois (Pet. App. C) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 2021. See Pet. App. A. A timely petition for rehearing and petition for rehearing en banc was denied on July 20, 2021. See Pet. App. B. The Court of Appeals had jurisdiction pursuant to Title 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code § 2241(c)(3) provides:

> (c) The writ of habeas corpus shall not extend to a prisoner unless —
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Title 28 United States Code § 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.

Title 18 United States Code § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18 United States Code § 924 provides:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . .
>
> (B) If the firearm possessed by a person convicted of a violation of this subsection-- . . . (ii) is a . . . destructive device, . . . the person shall be sentenced to a term of imprisonment of not less than 30 years.
>
> (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.

STATEMENT OF THE CASE

Title 18 U.S.C. § 1962(c)'s "Racketeering Activity" is defined in Title 18 U.S.C. § 1961(1)(A) to include many non-violent offenses including the act of "gambling". Section 1962(c)'s collection of "Unlawful Debt" is defined in Title 18 U.S.C. § 1961(6)(A)(B), in relevant part, as a debt "(A) incurred or

contracted in gambling activity . . . (B) which was incurred in connection with the business of gambling . . . ." Section 1962(c)'s "Unlawful Debt" is NOT an alternative crime with alternative elements, therefore, § 1962(c) RICO offense is indivisible, with a single, indivisible set of elements that do NOT require a defendant to use, attempt to use or threaten to use physical force against a person or property of another. Unlawful Debt is clearly a means of fulfilling the element of racketeering activity, i.e., the business of gambling activity.

Congress intentionally excluded Title 18 U.S.C. § 1962(c) from qualifying categorically as a crime of violence. Supporting this is the fact that Congress drafted Title 18 U.S.C. § 1959 (VICAR) within the same comprhensive racketeering legislation as Title 18 U.S.C. § 1962(c). Title 18 U.S.C. § 1959 (VICAR) is the violent racketeering offense that cannot ever be violated in a non-violent way.

Adding to the confusion is that Title 18 U.S.C. § 1962(c) can be violated by both violent means and non-violent means, therefore, disqualifying § 1962(c) from categorically qualifying as a "crime of violence" predicate for purposes of conviction under § 924(c)(3)(A)'s elements clause.

To make matters worse is the fact that Title 18 U.S.C. § 1961(1)(A)'s definition of racketerring activity's use of the term "any act or threat 'involving'" includes the act of conspiracy. Conspiracy does NOT qualify as a "crime of violence" in any way. Title 18 U.S.C. § 1962(c) RICO offense fails to qualify as a "crime of violence" predicate for purposes of conviction under § 924(c)(3)(A)'s elements clause in so many ways.

The Seventh Circuit claimed that Petitioner was procedurally barred and therefore denied Petitioner's 28 U.S.C. § 2241 petition. (Pet. App. A) It was held that "Petitioner did not meet the Seventh Circuit's threshold requirements for 28 U.S.C. § 2241". (Pet. App. A). The Seventh Circuit ignored Petitioner's

argument that a § 1962(c) RICO offense is indivisible and relied on Petitioner's predicate acts of Illinois' Attempted Arson and Attempted Residential Arson to deny his § 2241 petition as if § 1962(c) was divisible.

As relavant to this petition, Petitioner was charged with engaging in a pattern of racketeering activity (RICO Act) in violation of 18 U.S.C. § 1962(c), and using a carrying a firearm, during and in relation to the RICO charge, in violation of 18 U.S.C. § 924(c). The charges were based on Petitioner's membership in the Bishops street gang.

The RICO count alleged that the Bishops was a RICO enterprise, that the Petitioner was associated with the enterprise, and that the enterprise engaged in a pattern of racketeering activity through nine racketeering acts, only six of which applied to Petitioner. One of the six racketeering acts applicable to Petitioner was a marijuana distribution and the remaining five were Attempted Illinois' Arsons. The § 924(c) count charged Petitioner with using and carrying a firearm, specifically an incendiary device as defined in Title 18 U.S.C. § 924(a)(4), during and in relation to the RICO charge.

The case proceeded to trial. The jury convicted Petitioner of all counts. The court sentenced Petitioner to 240 months of imprisonment on the RICO count and a consecutive 360 months of imprisonment on the § 924(c) count. Petitioner was also convicted of RICO Conspiracy, Felon in Possession of a Firearm and Conspiracy to Distribute Marijuana. The sentences on those counts all ran concurrently with the 240 month RICO sentence.

On January 11, 2021, Petitioner, pro se, filed a writ of habeas corpus, pursuant to Title 28 U.S.C. § 2241, to vacate Petitioner's illegal § 924(c) conviction. Petitioner argued that an 18 U.S.C. § 1962(c) RICO offense is Indivisible because § 1962(c) has a single, indivisible set of elements that do

not require the use of force. Petitioner also argued that Congress did in fact intentionally excluded § 1962(c) RICO statute from being a "crime of violence" because Congress drafted 18 U.S.C. § 1959 VICAR (Violent Crimes in the Aid of Racketeering) within the same comprhensive racketeering legislation as Title 18 U.S.C. § 1962(c). On February 8, 2021, the district court denied with prejudice Petitioner's 28 U.S.C. § 2241 petition without soliciting any response from the government. See Pet. App. C. The district court held that Petitioner's claims were already determined on the merits in Petitioner's successive § 2255 motion. See Pet. App. C.

On February 16, 2021, Petitioner filed a Motion for Reconsideration pursuant to Fed. R. Civ. P. 59(e). On February 22, 2021, Petitioner filed an Amended Motion for Reconsideration. On February 23, 2021, the district court denied Petitioner's Motion for Reconsideration. See Pet. App. D. On March 1, 2021, the district court denied Petitioner's Amended Motion for Reconsideration. See Pet. App. E.

On March 11, 2021, Petitioner filed a Notice of Appeal to the Seventh Circuit. On May 19, 2021, the panel disposed of this case in a three page Order. See Pet. App. A. The Seventh Circuit relied on Petitioner's racketeering acts and held that Petitioner's racketeering acts were "crimes of violence" and also, that Petitioner had not satisfied the Seventh Circuit's threshold requirements for 28 U.S.C. § 2241. On June 28, 2021, Petitioner filed a petition for rehearing and petition for rehearing en banc. On July 20, 2021, the Seventh Circuit denied Petitioner's petition for rehearing and petition for rehearing en banc. See Pet. App. B.

Petitioner now respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE PETITION

Courts have so far departed from the accepted and usual course of judicial proceedings, that there is a call for an exercise of this Court's supervisery power. Under Taylor, this Court stated, "it is impermissible for a particular crime to sometimes count towards enhancement and sometimes not, depending on the facts of the case." Id. 495 at 601. That essential legal premise was reiterated in subsequent cases. See Descamps v. United States, 186 L.Ed. 2d 438, 455-56 (2013)(explaing that a crime would qualify as an enhancement predicate in all cases or none at all). Mathis v. United States, 136 S. Ct. 2243, 2251 (2016) (same). With this Court's decisions in Taylor, Descamps and Mathis and Congress' enactment of Title 18 U.S.C. § 1959 VICAR (Violent Crimes in the Aid of Racketeering), the question of weather an 18 U.S.C. § 1962(c) RICO offense qualifies as a predicate crime of violence for purposes of conviction under Title 18 U.S.C. § 924(c)(3)(A)'s elements clause is critically important. The United States Court of Appeals for the Seventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

More and more courts are ignoring this Court's decisions in Taylor, Descamps and Mathis and Congress' intentions concerning § 1962(c) RICO. Section 1962(c) RICO offense does NOT require the use of force. Interpreting § 1962(c) RICO offense to categorically qualify as a crime of violence would contravene the manifest legislative intent of Congress, in violation of the separation of powers, where Congress must be regarded as having intentionally excluded Title 18 U.S.C. § 1962(c) RICO offense from categorically qualifying as a crime of violence.

This issue is vitally important because more and more Court of Appeals are agreeing with the Second Circuit's reasoning that, "because racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged." United States v. Ivezaj, 568 F.3d 88, 96 (2nd Cir. 2009). See also, Espinoza v. United States, No. 16-4145, 2017 WL 4401626 (C.D. Ill. Oct. 3, 2017), aff'd, 710 F. App'x 267 (7th Cir. 2018)(District Court and Seventh Circuit both accepted this reasoning in Petitioner's previous appeal). See also, Pet. App. A. The issue with all these decisions are that § 1962(c) is NOT divisible. Therefor, the inquiry ends at Title 18 U.S.C. § 1962(c)'s statutory language because § 1962(c)'s collection of "unlawful debt" is NOT an alternative crime with its own alternative elements. Title 18 U.S.C. § 1962(c) is in fact indivisible.

The Seventh Circuit's contrary holding was a willful act of ignoring this Court's precedent to obtain a desired result rather than an exercise in statutory interpretation. Rather than accept this Court's straightforward conclusion in Taylor, Descamps and Mathis, and Congress' intentions for § 1962(c), the Seventh Circuit in effect, ignored the language of § 1962(c) and this Court's precedent, along with Congress' intentions for § 1962(c).

A. TITLE 18 U.S.C. § 1962(c)'s COLLECTION OF "UNLAWFUL DEBT" IS NOT AN ALTERNATIVE CRIME WITH ALTERNATIVE ELEMENTS

This Court, not long ago, in Mathis v. United States, 136 S. Ct. 2243 (2016), explained how Mathis concerned a third kind of statute: "not one that lists multiple elements disjunctively, but instead, one that enumerates various factual means of committing a single element". Id. at 2249. At issue was Iowa's burglary statute which reached a broader range of places ("any building, structure, or

land, water, or air vehicle") than generic burglary. See Iowa Code § 702.12 (2013). This Court held that "those listed locations [in Iowa's burglary statute) are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locationale element . . . ." Mathis, 136 S. Ct. at 2250. This Court held that the ACCA treats these kinds of statutes as it does all others, i.e., the categorical approach applies. Id. In other words, this Court concluded that a statute is considered divisible, and therefore subject to the modified categorical approach, ONLY if it creates mutiple offenses by setting forth alternative elements, not alternative means. Id. at 2253-54.

Title 18 U.S.C. § 1962(c) RICO provides:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the **conduct** of such **enterprise's** affairs **through a pattern of racketeering activity** or collection of unlawful debt."

(Emphasis added. Double quotations added).

This Court concluded that the ONLY elements of Title 18 U.S.C. § 1962(c) are (1) conduct (2) of an enterprise (3) through a pattern of racketeering activity. Salinas v. United States, 522 U.S. 52, 62 (1997).

Now, this Court held that "the first task for a court faced with an alternatively phrased statute is thus to determine whether the listed items are elements or means". Mathis v. United States, 136 S. Ct. 2243, 2256 (2016). Title 18 U.S.C. § 1962(c)'s "Racketeering Activity" and "Unlawful Debt" are both defined in Title 18 U.S.C. § 1961.

Title 18 U.S.C. § 1961(1)(A) provides in relevant part:

> (1) **"Racketeering Activity means** (A) any act or threat involving murder, kidnapping, **gambling** . . . ."

(Emphasis added. Double quotations added).

Title 18 U.S.C. § 1961(6)(A)(B) provides in relevant part:

> (6) **"Unlawful Debt means a debt** (A) incurred or contracted in **gambling activity . . .** (B) which was incurred in **connection with the business of gambling . . . ."**

(Emphasis added. Double quotations added).

It is clear not only from § 1962(c)'s elements but also from the language of §§ 1961(1)(A) and 1961(6)(A)(B) that "Unlawful Debt" is NOT an alternative crime with alternative elements. Unlawful Debt is ONLY a means of fulfilling the element of racketeering activity, i.e., the business of gambling activity.

Legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes. Shad v. Arizona, 501 U.S. 624, 636 (1991)(plurality opinion). Title 18 U.S.C. § 1962(c) is NOT divisible and the modified categorical approach does NOT apply. The modified categorical approach applies ONLY when a statute sets forth alternative elements for alternative crimes. Shepard v. United States, 125 S. Ct. 1254 (2005). See also, Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)(same).

Therefore, the categorical approach applies and the inquiry ends at Title 18 U.S.C. § 1962(c)'s statutory definition. When a statute defines only a single crime with a single, indivisible set of elements, application of the categorical approach is straightforward. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). It is undisputed that Title 18 U.S.C. § 1962(c) sets forth a single, indivisible set of elements. See Salinas v. United States, 522 U.S. 52, 62 (1997).

Title 18 U.S.C. § 1962(c) RICO does NOT, under Mathis, categorically qualify as a "crime of violence" predicate for purposes of conviction under Title 18 U.S.C. § 924(c)(3)(A)'s elements clause. Petitioner's § 924(c) conviction is illegal.

B. INTERPRETING TITLE 18 U.S.C. § 1962(c) RICO TO CATEGORICALLY QUALIFY AS A CRIME OF VIOLENCE WOULD CONTRAVENE THE MANIFEST LEGISLATIVE INTENT OF CONGRESS, IN VIOLATION OF THE SEPARATION OF POWERS

Title 18 U.S.C. § 1962(c) RICO proscribes conduct that both qualifies, and does NOT qualify as "violent" for purposes of categorically qualifying an offense under § 1962(c) as a predicate "crime of violence" for purposes of conviction under 18 U.S.C. § 924(c)(3)(A)'s elements clause. See 18 U.S.C. § 1961(1)(A), defining racketeering activity.

Now, by including conduct that is both violent and non-violent among Title 18 U.S.C. § 1962(c)'s proscriptions, Congress did not intend such to "categorically" qualify as a crime of violence in every instance - a conclusion that is, ipso facto, supported by Congress' broad inclusion of non-violent means of committing a § 1962(c) RICO offense. Supporting this contention, is the fact that Congress, when codefying its racketeering proscriptions within the same comprehensive racketeering legislation including § 1962(c), specifically created a categorical crime of violence entitled "Violent Crimes In The Aid Of Racketeering." See Title 18 U.S.C. § 1959. In stark contrast to § 1959, § 1962(c) was NOT so designated a "violent crime in the aid of racketeering." Cf. 18 U.S.C. § 1962(c).

With § 1959 (VICAR) on the one hand (covering racketeering activity that is categorically qualified as a violent crime), and with § 1962(c) RICO on the other (covering racketeering activity but NOT being categorically designated as a crime of violence), this Court must give effect to Congress' manifest intent with both statutes.

First, it is a general rule of statutory interpretation that "when the legislature uses certain language in one part of [a] statute and different language in another, the court assumes the different meanings were intended."

Sosa v. Alvarez-Machain, 542 U.S. 692, 712 n. 9, 124 S. Ct. 2739, 159 L.Ed. 2d 718 (2004). Thus, it is clear from the different racketeering proscriptions that Congress knew how to categorically qualify § 1962(c) as a crime of violence but did not. This Court must assume, therefore, that the two statutes are qualitatively distinct and that Congress' qualifications with respect to one or both was "intended". Thus, to interpret § 1962(c) as categorically qualifying as a "crime of violence" would contravene the manifest legislative intent of Congress by doing so in the face of their obvious decision to NOT qualify § 1962(c) as a crime of violence as they did with § 1959 (VICAR).

Second, "[w]hen confronted woth two Acts of Congress allegedly touching on the same topic, [the courts are] not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both". See Morton v. Mancari, 417 U.S. 535, 551 (1974). A party seeking to suggest that the two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995). Here, any claim that the statutes cannot be harmonized is barred by the "clear and manifest" intent of Congress delineated above. Morton, supra, at 551.

In particular, despite overlap in the racketeering proscriptions of §§ 1959 (VICAR) and 1962(c) (RICO), each may harmoniously exist within its own legislative domain by interpreting one to always count as a crime of violence (i.e., § 1959 has been categorically designated a crime of violence that cannot ever be committed by non-violent means) while interpreting the other to only, if ever, qualify as a crime of violence under the now defunct residual clause of Title 18 U.S.C. § 924(c)(3)(B). Such an interpretation not only has the benefit of the clear and

manifest intent of Congress when enacting both proscriptions, but such has the additional benefit of fitting with the "categorical approach" Congress has been said to have imparted use of when enacting Title 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(3). See United States v. Davis, 139 S. Ct. 2319 (2019)(Slip Op. at pages 10-17). If Congress imparted use of the categorical approach when it created §§ 924(c)(1)(A) and 924(c)(3), it only makes sense, then, that they would signal which crimes they have desiganted as categorically qualifying as a crime of violence.

This Court has time and again told inferior courts to apply the plain language of statutes. "The preeminent canon of statutory interpretation requires [this Court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" BedRoc Ltd., LLC v. United States, 541 U.S. 176 (2004).

In the end, the Separation of Powers counsels restraint and courts should, therefore, avoid accepting conflict over harmony when interpreting Title 18 U.S.C. § 1962(c) RICO. Epic Systems Corp. v. Lewis, 200 L. Ed. 2d 889, 902 (2018).

C. UNDER TAYLOR AND ITS PROGENY, TITLE 18 U.S.C. § 1962(c) CANNOT SOMETIMES QUALIFY AS A CRIME OF VIOLENCE AND SOMETIMES NOT DEPENDING ON THE FACTS OF THE CASE

Some courts agree with the Second Circuit's reasoning that "[b]ecause racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged." United States v. Ivezaj, 568 F.3d 88, 96 (2nd Cir. 2009). See also, Haynes v. United States, 936 F.3d 683, 691 (7th Cir. 2019)(Specific 'acts of racketeering activity' are elements that must be proven beyond a reasonable doubt . . . .").

This reasoning fails for three reasons: (1) In United States v. Ivezaj, the Second Circuit specifically decided that Ivezaj's predicate offenses were crimes of violence according to Title 18 U.S.C. § 924(c)(3)(B)'s now defunct residual clause. See United States v. Ivezaj, 568 F.3d 88, 96 (2nd Cir. 2009); (2) Under Taylor v. United States, 495 U.S. 575 (1990) and its progeny, Title 18 U.S.C. § 1962(c) RICO CANNOT sometimes qualify as a "crime of violence" and sometimes NOT depending on the facts of the case, i.e., conduct; and (3) Title 18 U.S.C. § 1962(c) RICO is indivisible because § 1962(c)'s collection of "Unlawful Debt" is ONLY a means of fulfilling the element of racketeering activity, i.e., the business of gambling activity. See Argument A.

Now, it is indisputable that the "categorical approach" governs analysis under 18 U.S.C. § 924(c)(3) as to the question of whether a violation of Title 18 U.S.C. § 1962(c) RICO constitutes a "crime of violence". More than 30 years ago, this Court in Taylor v. United States, 495 U.S. 575 (1990), set out the rule governing application of this "categorical approach".

Under Taylor, this Court stated, "it is impermissible for a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case." Id. 495 at 601. That essential legal premise was reiterated in subsequent cases. See Descamps v. United States, 186 L. Ed. 2d 438, 455-56 (2013) (explaing that a crime would qualify as an enhancement predicate in all cases or none at all). Mathis v. United States, 136 S. Ct. 2243, 2251 (2016)(same).

In the case of 18 U.S.C. § 1962(c) RICO, it is clear that "a pattern of racketeering activity" is an "element" of a § 1962(c) RICO offense. That does NOT mean, however, that such element is itself divisible and, therefore, may sometimes count towards conviction and sometimes not. Rather, like the "locationale element" confronted in Mathis - one which was required to be proven in

order to convict like the pattern of racketeering element here - the racketeering activity charged need not be relegated to means that are "violent".

A question, therefore, arises: Can the crime codified at 18 U.S.C. § 1962(c) sometimes count and sometimes not count for the purposes of conviction under Title 18 U.S.C. § 924(c)(3)(A)'s elements clause? As Petitioner submits, Taylor and its progeny answer the question in the negative.

The history, structure and language demonstrate that the pattern of racketeering element of § 1962(c) sets forth an indivisible and overbroad element that disqualifies an offense under that section from always counting, on a categorical basis, as a "crime of violence" for purposes of conviction under § 924(c)(3)(A)'s elements clause.

Failing then, to categorically qualify as a crime of violence for purposes of conviction, Petitioner's § 924(c) conviction, with a § 1962(c) RICO offense serving as the underlying predicate "crime of violence", was therefore necessarily interdependant upon the now defunct residual clause of § 924(c)(3)(B). Therefore, Petitioner's § 924(c) conviction is illegal.

D. TITLE 18 U.S.C. § 1961(1)(A)'s DEFINITION OF "RACKETEERING ACTIVITY" IS OVERBROAD FOR PURPOSES OF QUALIFYING AS A CRIME OF VIOLENCE BECAUSE THE TERM "INVOLVING" USED THEREIN HAS BEEN BROADLY INTERPRETED TO INCLUDE "CONSPIRACY" TO VIOLATE A PREDICATE ACT LISTED WITHIN 18 U.S.C. § 1961(1)(A)

In United States v. Davis, 139 S. Ct. 2319 (2019), this Court concluded that the defendant was entitled to relief because his underlying § 924(c) predicate offense, one charged as a "conspiracy" to commit a violent crime, was necessarily interdependant upon application of § 924(c)(3)(B)'s residual clause. Id. The Seventh Circuit has also held that a "conspiracy" to commit a violent crime does

NOT fall within the ambit of § 924(c)(3)(A)'s elements clause. See D'Antoni v. United States, 916 F.3d 658, 664-65 (7th Cir. 2019).

Now, Title 18 U.S.C. § 1961(1)(A) provides in relevant part:

> (1) "racketeering activity means (A) **any act or threat involving** murder, kidnapping, gambling, arson, robbery, extortion, dealing in an obscene matter . . .".

(Emphasis added. Double quotations added).

Thus, where 18 U.S.C. § 1961(1)(A)'s definition of racketeering activity includes use of the term "involving" a predicate act falling within its proscriptions, such renders a crime under 18 U.S.C. § 1962(c) overbroad for purposes of qualifying as a predicate crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause. This is true because, a number of courts have held, the term "involving" in § 1961(1), "has been held to be broad enough to include as a predicate act of racketeering, a conspiracy to commit the offense enumerated in § 1961(1)". See First Federal Sav. & Loan Assoc. v. Oppenheim, Appel, Dixon & Co., 629 F. Supp. 427 (1986, S.D.N.Y.). See also, United States v. Pungitore, 918 F.3d 1084, 1134 (3d Cir. 1990)(same).

Now, in pointing to the interpretation of the term "involving" as used within 18 U.S.C. § 1961(1)(A) in other cases, Petitioner has carried his burden of establishing that § 1962(c), which incorporates the definition of racketeering activity at § 1961(1)(A) using the same term "involving", is overbroad for purposes of categorically qualifying as a crime of violence under § 924(c)(3)(A)'s elements clause. See Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)(when making an overbreadth claim a defendant must point to his own case or other cases in which the courts applied the statute in an overbroad manner). Petitioner's § 924(c) conviction is illegal.

E. PETITIONER IS ACTUALLY INNOCENT OF HIS § 924(c) CONVICTION AND THEREFORE CANNOT BE PROCEDURALLY BARRED FROM ATTACKING HIS § 924(c) CONVICTION UNDER 28 U.S.C. § 2241

The Seventh Circuit has made clear that 18 U.S.C. § 924(c) is not a sentence - enhancement statute. Section 924(c) defines a stand alone crime. See Davilla v. United States, 843 F.3d 729 *1 (7th Cir. 2016). Petitioner's § 924(c) conviction illegally increased his sentence approximately thirty years beyond that authorized by law, which went to the "fundamental legality" of Petitioner's detention and asserted an error that constituted a miscarriage of justice. Therefore, since § 1962(c) is NOT a "crime of violence" as that term is defined in § 924(c)(3)(A), Petitioner is actually innocent of his § 924(c) conviction and is imprisoned for a nonexistent crime, which resulted in a miscarriage of justice.

The miscarriage of justice exception survived the AEDPA's passage intact and unrestricted. McQuiggin v. Perkins, 133 S. Ct. 1924, 1934 (2013). "Actual innocense, if proved, serves as a gateway through which a prisoner may pass even if the impediment is a procedural bar, as it was in Schlup v. Delo, 115 S. Ct. 851 (1995) and House v. Bell, 126 S. Ct. 2964 (2006)." McQuiggin v. Perkins, 133 S. Ct. 1924, 1934 (2013).

This Court has applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, see Kuhlman v. Wilson, 106 S. Ct. 2616 (1986)(plurality opinion) and "abusive" petitions asserting in a second petition claims that could have been raised in a first petition. See McClesky v. Zant, 111 S. Ct. 1454 (1991).

Petitioner is imprisoned for a nonexistent crime, which resulted in a miscarriage of justice. Therefore, Petitioner cannot be procedurally barred from

filing a petition under 28 U.S.C. § 2241, when Petitioner is actually innocent of a § 924(c) conviction.

To make matters worse, the Seventh Circuit requires a defendant to meet three requirements in order to file a petition under 28 U.S.C. § 2241, to open the portal of the "Savings Clause" of 28 U.S.C. § 2255(e). See In re Davenport, 147 F.3d 605, 611 (7th Cir. 1998). The Seventh Circuit has since added to the three Davenport requirements. See Chazen v. Marske, 938 F.3d 851 (7th Cir. 2019)(concurring separate opinion). The Seventh Circuit has now stated the "Savings Clause" test in so many ways that it is hard to identify exactly what they require. And the resulting confusion has caused Seventh Circuit law to drift beyond the course the Seventh Circuit set in In re Davenport. See 147 F.3d 605, 611 (1998). At this point, the Seventh Circuit's definition of "inadequacy" and "ineffectiveness" under 28 U.S.C. § 2255(e) undermines the limits that 28 U.S.C. § 2255(h) imposes on second and successive motions. Seventh Circuit cases, however, have phrased Davenport's test so inconsistently. See Chazen v. Marske, 938 F.3d 851 (7th Cir. 2019)(concurring separate opinion).

None of this is surprising. The law in this area is complex in the extreme; unexpected difficulties and nuances surface in new cases; and it often takes this Court deciding additional cases for clarity and stability to begin to emerge. In the end, Petitioner's § 924(c) conviction is illegal.

CONCLUSION

For the foregoing reasons, Petitioner prays that the petition for writ of certiorari should be granted.

Respectfully submitted,
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