

No. 18-_____

IN THE
Supreme Court of the United States

BRIAN PETER ZATER,
Petitioner - Appellant,

vs.

WARDEN, FCC COLEMAN - MEDIUM,
Respondent - Appellee.

PETITION FOR A WRIT OF CERTIORARI
to the U.S. Court of Appeals
for the Eleventh Circuit

PETITIONER'S BRIEF ON MERITS

Brian P. Zater #96904-071
FCC Coleman Medium
P.O. Box 1032
Coleman, FL 33521-1032
Pro se

February 7, 2018

QUESTION PRESENTED FOR REVIEW

Whether a Federal Circuit Court may dismiss the criminal appeal of an incarcerated defendant solely because the defendant is poor and cannot pay the filing fee?

LIST OF PARTIES IN COURT BELOW

Pursuant to Supreme Court Rule 29.6, the following persons have an interest in the outcome of these proceedings:

- * Bryon Robinson, G.
Eleventh Circuit Deputy Clerk of Court
- * Downing, Jeffrey S.
Assistant U.S. Attorney
- * Hodges, W. Terrell
Senior U.S. District Court Judge
- * Lammens, Philip R.
U.S. Magistrate Judge
- * Smith, David J.
Eleventh Circuit Clerk of Court
- * Warden, FCC Coleman-Medium
- * Zater, Brian P.
Petitioner

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Originating District Court Case No:
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All of the following decisions are unpublished and attached hereto in the Appendix:

- * Appendix A: Fourth Circuit Court of Appeals Opinion (Direct Appeal); Mar. 30, 2001; US v Zater, No. 01-4525.
- * Appendix B: District of South Carolina Court Order (Initial §2255); Sept. 30, 2002; Zater v US, 2002 U.S.Dist.LEXIS 28018, and Dec. 17, 2002; Zater v US, 2002 U.S.Dist.LEXIS 28019.
- * Appendix C: Fourth Circuit Court of Appeals Opinion (Request for COA); May 20, 2003; Zater v US, 63 Fed. Appx. 159.
- * Appendix D: Fourth Circuit Court of Appeals Order (§2244 Request); June 10, 2016; In re Zater, No. 16-787.
- * Appendix E: Fourth Circuit Court of Appeals Order (Reconsideration of §2244 Request); July 1, 2016; In re Zater, No. 16-9382.
- * Appendix F: Middle District of Florida Order (§2241 habeas corpus); June 19, 2017; Zater v Warden, Case No. 5:16-cv-639-Oc-10PRL.
- * Appendix G: Eleventh Circuit Court of Appeals Notice of §2241 Dismissal; Jan. 12, 2018; Zater v Warden, Case No. 17-12990-G.

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Brian Peter Zater ("Zater") respectfully petitions this Court for a Writ of Certiorari, as the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this matter under 28 U.S.C. §1254(1) because:

On January 12, 2018, the United States Court of Appeals for the Eleventh Circuit dismissed Zater's appeal for want of prosecution because Zater failed to pay the filing fee, notwithstanding the fact that he asked for and met the "in forma pauperis" standard.

CONTROLLING PROVISIONS, STATUTES & REGULATIONS

- * United States Constitution, Amendment 14, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- * 28 United States Code, Section 453, provides:

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ---, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as --- under the Constitution and laws of the United States. So help me God."

- * 28 United States Code, Section 1915(e)(2)(B)(i), provides:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious.

STATEMENT OF THE CASE

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 Zater with conspiracy to commit bank robbery, in violation of 18 U.S.C. §371. Count Two and Five charged Zater with armed bank robbery, in violation of 18 U.S.C. §2113(a)(d). Counts Three and Six charged Zater with using firearms in 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. The Honorable Dennis W. Shedd, who is now on the Fourth Circuit Court of Appeals, sentenced Zater to a term of imprisonment of 594 months (49½ years).

Zater's direct appeal was denied on March 30, 2001. See United States v Zater, No. 01-4525 (4th Cir. 2001)(unpublished).

On March 19, 2002, Zater filed a timely initial §2255, which was dismissed in part on September 30, 2002 (see 2002 U.S. Dist.LEXIS 28018), and summarily dismissed the remainder on December 17, 2002 (see 2002 U.S.Dist.LEXIS 28019). A request for a certificate of appealability was denied by the Fourth Circuit on May 20, 2003. See Zater v United States, 63 Fed.Appx. 159 (4th Cir. 2003)(unpublished).

Zater filed two §2244 applications based on Johnson, requesting leave to file a second §2255. The first was denied on June 10, 2016 (In re Zater, No. 16-787), and the second was

denied on July 1, 2016 (In re Zater, No. 16-9382).

Ever diligent, Zater moved the U.S. District Court for the Middle District of Florida, Ocala Division, for a §2241 writ of habeas corpus on October 27, 2016, since it was his district of confinement. See Zater v Warden, FCC Coleman-Medium, Case No. 5:16-cv-639-Oc-10PRL. This was denied On June 19, 2017.

Since no certificate of appealability is needed to appeal the denial of a §2241 petition in the Eleventh Circuit, Zater filed a timely Notice of Appeal and moved for In Forma Pauperis status, which Zater has been granted IFP at every stage of his previous criminal proceedings. See Appeal No. 17-12990-G.

After filing of the initial opening brief of petitioner, the Deputy Clerk of Court for the Eleventh Circuit held Zater's IFP status revoked since, after the en banc **McCarthan**^{fn1} decision, Zater's argument lacked merit; notwithstanding that Zater's argument would have had merit in ten of the other twelve circuits. The Deputy Clerk informed Zater that his brief would only be heard if he paid the filing and docketing fees.

Since Zater lacked the financial wherewithal to pay said fees, his appeal was dismissed for want of prosecution. See Appendix G, appended hereto.

Zater now files the instant Petition for a Writ of Certiorari seriatim, requesting this Court to exercise its supervisory powers, clarifying the IFP standard.

fn1: McCarthan v Director of Goodwill Industies-Suncoast, Inc, 851 F.3d 1076 (11th Cir. 2017)(en banc).

PRELIMINARY STATEMENT

In order to qualify for "in forma pauperis," movants must meet two requirements:

- (a) be indigent, and
- (b) the appeal cannot be frivolous.

Because Zater has been incarcerated for almost 18 years, and has previously been granted IFP status at every proceeding, no party will dispute that he is economically eligible for IFP.

The proper adjudication of this motion turns on whether the issue under consideration is or is not frivolous. And this Court has previously instructed that an appeal is frivolous only if it lacks an arguable basis in law or fact.^{fn2}

The standards for utilizing the "savings clause" and proceeding under §2241 habeas corpus have no uniformity. Every circuit has weighed in on the matter and come to different determinations. Had Zater of filed his §2241 petition in ten of the twelve circuits, he would have had the proper "merit" to qualify for the second provision of IFP. But since Zater had to file his §2241 petition in the Eleventh Circuit under the dictates of **McCarthan**, he lacked the "merit" required to be granted IFP status.

Being that Zater's §2241 petition would have had merit in ten other circuits, Zater avers that there was an arguable basis in law or fact, and that he should have been granted IFP status.

fn2: See McCoy v Court of Appeals of Wisconsin Dist 1, 486 US 429, 439-440 (1985).

Further, as evinced by the Clerk's letter dismissing the case, Zater's brief would have been heard on the merits if only he had the financial wherewithal to pay the filing fees.

Which can only lead to the conclusion that Zater is being penalized solely because he is poor, which goes against the Oaths of justices and judges.^{fn3} And is in violation of the Equal Protection Clause of the Fourteenth Amendment.

fn3: See 28 U.S.C. §453 ("I, _____, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich...").

ARGUMENT

Zater's Indigence Should Not Preclude Him
From Having His Motion Decided on the Merits.

Zater attempted to utilize the actual innocence gateway doctrine as a basis for accessing §2255(e)'s "savings clause" and proceeding under §2241 habeas corpus.

While this motion was pending, the Eleventh Circuit reversed course and issued the en banc **McCarthan** decision stating that the saving clause may no longer be used for actual innocence, being sentenced over the statutory maximum, nor if a defendant was sentenced for a non-existent offense. This was in direct conflict with ten of the other twelve circuits.

Shortly thereafter, Zater's habeas petition was denied in line with this reasoning, and his in forma pauperis status was revoked.

In the Eleventh Circuit a certificate of appealability is not needed to appeal the denial of a §2241 petition. Zater filed a timely notice of appeal, but due to **McCarthan** rendering his appeal "frivolous" in the Eleventh Circuit, he could not qualify for IFP in the circuit of his confinement, and thereby his appeal would only be processed if he paid the filing and docketing fees.

Clearly Zater does not have the financial wherewithal to meet this onerous burden and, therefore, his appeal was dismissed for want of prosecution because he failed to pay the

filing and docketing fees.

The federal in forma pauperis statute, enacted in 1892, and presently codified as 28 U.S.C. §1915, is designed to ensure that indigent litigants have meaningful access to the federal courts. Adkins v E.I. DuPont de Nemours & Co, 335 US 331, 342-343 (1948). Toward this end, §1915(a) allows a litigant to commence a civil or criminal action in federal court in forma pauperis by filing in good faith an affidavit stating, inter alia, that he is unable to pay the costs of the lawsuit. Congress recognized, however, that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous lawsuits. To prevent such abusive litigation, §1915 authorizes federal courts to dismiss a claim filed in forma pauperis "if the court determines that the action or appeal is frivolous." 28 U.S.C. §1915(e)(2)(B)(i).

The Courts of Appeals have generally adopted as formulae for evaluating frivolousness under §1915 close variants of the definition of legal frivolousness which this Court articulated in the Sixth Amendment case of Ander v California, 386 US 738 (1967). Therein, it stated that an appeal on a matter of law is frivolous where none "of the legal points [are] arguable on their merits." *Id.* at 744. By logical extension, a complaint containing both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or

fact. See Neitzke v Williams, 490 US 319, 325 (1989).

Section 1915(e) is designed largely to discourage the filing of, and waste of judicial resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions. To this end, the statute accords judges the authority to dismiss a claim based on an indisputably meritless legal theory, or to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. See Ashcroft v Iqbal, 556 US 662, 696 (2009)(baseless in this context means "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel").

When a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the petitioner, this does not amount to frivolousness. Neitzke, supra at 328. To term these claims frivolous is to distort measurably the meaning of frivolousness both in common and legal parlance. Id. at 329. This Court in Neitzke concluded that "the in forma pauperis statute [is] to assure equality of consideration for all litigants," Coppedge v United States, 369 US 438, 447 (1962), not just paying litigants.

But, in the case sub judice, it would be impossible to hold Zater's case "frivolous" under the above rationale, as Courts of Appeals from other circuits have ruled the exact opposite

to the Eleventh Circuit, thereby entrenching the circuit split.

As to Zater's presented actual innocence claim in his §2241 habeas, the Seventh Circuit has already ruled in Zater's favor. So, had Zater been confined in another part of the country, he would have been home right now.

Which brings us to the question: Does the term "frivolous" as applied in §1915 mean (a) frivolous in the circuit the motion is being filed, or (b) frivolous throughout the United States?

Zater posits that the Eleventh Circuit is being overly strict by only looking to its holding to determine if there is an arguable basis in law or fact, and neglecting its sister circuits holdings, when determining whether to grant or deny IFP status.^{fn4}

fn4: But I, being poor, have only my dreams;
I have spread my dreams under your feet;
Tread softly because you tread on my dreams.

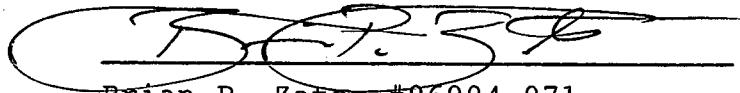
- William Butler Yeats

"He Wishes for the Clothes of Heaven" [1899]

CONCLUSION

Wherefore, premises considered and good cause shown, Zater prays this Court to grant certiorari so that it can exercise its supervisory powers and direct the Eleventh Circuit on the correct IFP requirements, whereby allowing Zater to proceed with his claim despite his indigence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. P. Zater", is written over a horizontal line. The signature is stylized with loops and flourishes.

Brian P. Zater #96904-071

FCC Coleman Medium

P.O. Box 1032

Coleman, FL 33521-1032

Pro se

CERTIFICATE OF COMPLIANCE

Zater hereby certifies that every aspect of this petition comports to Supreme Court Rule 33.2, as he is an incarcerated pro se inmate proceeding in forma pauperis.

/s/ 
Brian P. Zater