UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 10-12022-D

JAMES CHAPLIN
Petitioner-Appellant,

v.

DEBORAH A. HICKEY, Warden, Jesup Federal Correctional Institution, and ERIC HOLDER, Attorney General of the United States
Respondent-Appellee.

On Appeal from the United States District Court
For the Southern District of Georgia
Brunswick Division
District Court Case No. 2:09cvO0114-LGW-JEG

BRIEF OF APPELLANT

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NO. 10-12022-D

JAMES CHAPLIN v. DEBORAH HICKEY, *et al.*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

James Chaplin, Appellant

James E. Graham, United States Magistrate Judge

Deborah A. Hickey, Warden

Eric Holder, Jr., United States Attorney General

William Mallory Kent, *pro bono* counsel for Chaplin

James C. Stuchell, Assistant United States Attorney

Edward J. Tarver, United States Attorney

Lisa Godbey Wood, Chief United States District Judge

STATEMENT REGARDING ORAL ARGUMENT

Appellant Chaplin requests oral argument to assist the Court in the resolution of the issues presented in this appeal.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the merits issues appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED DENYING CHAPLIN'S §2241 HABEAS PETITION BASED ON THE SECOND PRONG OF *WOFFORD* WHERE CHAPLIN WAS SENTENCED UNDER THE ARMED CAREER CRIMINAL ACT BASED ON A NONEXISTENT PREDICATE OFFENSE, IN LIGHT OF THE RETROACTIVELY APPLICABLE SUPREME COURT DECISIONS *BEGAY* AND *CHAMBERS*?

II. WHETHER THE DISTRICT COURT ERRED DENYING CHAPLIN'S HABEAS CORPUS PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING TO AFFORD CHAPLIN AN OPPORTUNITY TO PROVE HE IS ACTUALLY INNOCENT OF THE ACCA?

STATEMENT OF THE CASE

COURSE OF THE PROCEEDINGS

On July 31, 2009, Chaplin filed a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 in the United States District Court for the Southern District of Georgia, Brunswick Division, challenging the legality of his detention. (Dkt. No. 1-2). Chaplin argued that in the wake of *Begay v. United States*, 553 U.S. 137 (2008) (which held that New Mexico's felony DUI crime falls outside the scope of the ACCA's "violent felony" definition), and *Chambers v. United States*, 129 S.Ct. 687 (2009)(which held that Illinois' crime of failure to report for penal confinement falls outside the scope of ACCA's "violent felony" definition), his prior conviction for a walk away escape does not qualify as a violent felony under the Armed Career Criminal Act. (Doc. 1-2 at 8-10). Chaplin argued that 28 U.S.C. § 2255 provides an "inadequate and ineffective" remedy (Dkt. No. 1 at 13-14). Chaplin argued that *Begay* and *Chambers* were retroactive Supreme Court decisions because they decided a meaning of a criminal statute enacted by Congress. (Dkt. No. 1-2 at 8-13).

On August 6, 2009, the district court issued a show cause order directing the respondents to show cause, in writing, why Chaplin's writ should not be granted. (Dkt. No. 3).

On October 9, 2009, Assistant United States James C. Stuchell, representing

the respondents, filed a motion to dismiss.

On or about October 24, 2009, Chaplin filed a reply in opposition to the respondents' motion to dismiss.

On February 11, 2010, the United States Magistrate Judge issued a report and recommendation to deny Chaplin's § 2241 habeas petition. (Dkt. No. 13).

On or about February 19, 2010, Chaplin filed "objections to [the] report and recommendation." (Dkt. No. 15).

On April 8, 2010, the district court issued an opinion addressing Chaplin's objections to the Magistrate Judge's report and recommendation. *See Chaplin v. Hickey*, 2001 WL 1416980 (S.D. Ga. 2010) (unreported). On that same date, the Court issued a final judgment denying Chaplin's § 2241 habeas petition.

On April 23, 2010, Chaplin filed a notice of appeal and a motion for permission to appeal *in forma pauperis.* On May 19, 2010, the district court issued an order denying Chaplin's motion to proceed on appeal through *in forma pauperis.* This appeal followed.

STATEMENT OF THE FACTS

Chaplin was charged with possession of a firearm and ammunition by a convicted felon in the Middle District of Florida, Jacksonville Division, in violation of 18 U.S.C. § 922(g)(1) and 924(e)(Case No. 3:02-cr-251-J-25HTS). Chaplin

proceeded to trial and was convicted for possession of ammunition by a convicted felon, in violation of 18 U.S.C. §§922(g) (1) and 924(e).

At sentencing the district court concluded that Chaplin's prior conviction for: (1) a 1967 conviction for armed robbery; (2) a 1986 conviction for attempted homicide; and (3) a 1987 conviction for escape required the court to sentence Chaplin under the Armed Career Criminal Act. Defense counsel objected to the use of the escape, in violation of Florida Statutes, § 944.40, claiming that it was a walk away offense and not a crime of violence, but conceded that *United States v. Gay*, 251 F.3d 950 (11th Cir. 2001), held otherwise.

On September 25, 2003, the United States District Court for the Middle District of Florida, sentenced Chaplin to 235 months imprisonment to be followed by five years supervised release under the Armed Career Criminal Act ("ACCA").

Chaplin appealed claiming that the district court erred (1) denying his motion to suppress and (2) by enhancing his sentence based on his prior convictions that were not proven to the jury beyond a reasonable doubt. The Eleventh Circuit affirmed the conviction and sentence. *United States v. Chaplin*, 107 Fed.Appx. 184 (11th Cir.) (Table), cert. denied, 543 U.S. 862 (2004).

On March 21, 2005, Chaplin filed a 28 U.S.C. § 2255 motion in the district court of conviction (Case Number 3:05cv249-J-25HTS). In his § 2255 motion,

Chaplin argued that: (1) the district court erred by sentencing him as an Armed Career Criminal; (2) counsel was ineffective for failing to object to the same; (3) the district court constructively amended the indictment; (4) counsel was ineffective for failing to object to the same; (5) counsel was ineffective during pretrial stage for failing to advise him to admit guilty so he could get a sentence reduction for acceptance of responsibility. The district court denied Chaplin's § 2255 motion.

Chaplin filed a timely notice of appeal and sought a certificate of appealability from the Eleventh Circuit which was denied.

Chaplin then filed his § 2241 habeas petition asserting that his prior conviction for escape, in violation of Florida Statutes, § 944.40, no longer constitutes a "violent felony" in light of the new interpretation of 18 U.S.C. § 924(e)(2)(B)(ii), by the Supreme Court in *Begay* and *Chambers*. Chaplin is actually innocent of being an Armed Career Criminal in light of *Begay* and *Chambers* and he was sentenced to the ACCA based on a nonexistent predicate offense (that is, a predicate offense which exists, but which is not a crime of violence for ACCA purposes).[1]

The Magistrate Judge's Report and Recommendation recommended that

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[1] Chaplin's conviction of being a felon in possession of ammunition under 18 U.S.C. § 922(g)(l) would ordinarily subject him to a term of imprisonment not to exceed ten (10) years. 18 U.S.C. § 924(a)(2) were he not an ACC.

Chaplin's § 2241 habeas petition be dismissed because he could not satisfy the second prong of *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999).

Chaplin filed numerous objections to the Magistrate Judge's Report and Recommendation.

On April 8, 2010, the district court issued an opinion addressing Chaplin's objections to the Magistrate Judge's Report and Recommendation. The district court concluded that "Chaplin clearly meets the first and third *Begay [Wofford*] requirements: *Begay* [and *Chambers*] applies retroactively, and Circuit precedent precluded Mr. Chaplin's argument at the time of his original section 2255 motion (which must be brought within one year of conviction)." The district court found that "Chaplin objects to the Magistrate Judge's use and interpretation of *Wofford*, the Magistrate Judge's conclusion that Mr. Chaplin failed to show that section 2255 is an ineffective or inadequate remedy, the Magistrate Judge's Report insofar as it constitutes an unconstitutional suspension of the writ of habeas corpus, and the Magistrate's conclusion that *Wofford* applies to his claims. All of these objections surround the Magistrate Judge's interpretation of *Wofford*. The district court concluded that Chaplin could not show the second prong of *Wofford*: "2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense."

The District Court did *not* deny relief on the basis that Chaplin's prior conviction for a walk away escape was a crime of violence, nor did the Government argue below that Chaplin's walk away escape was a violent felony. The District Court's decision cited *United States v. Lee*, 586 F.3d 859 (11th Cir. October 26, 2009) (which held that a walk away escape under a New Jersey escape statute did not constitute a violent felony for ACCA purposes).[2]

[2] A separate panel of the Eleventh Circuit four days after *Lee* issued *United States v. Sanchez*, 586 F.3d 918 (11th Cir. October 30, 2009), which held that an escape under Florida Statutes, § 944.40 was a violent felony for "three strike" purposes under 18 U.S.C. 3559(c)(2)(F)(ii), and rejected the defendant's argument that his offense was properly charged under Florida Statutes, § 945.091(4). The *Sanchez* decision did not cite *Lee*, as to which it is arguably in conflict. *Sanchez* was not an ACCA case.

STANDARDS OF REVIEW

The availability of habeas corpus relief under 28 U.S.C. § 2241 savings clause presents a question of law this Court reviews de novo. *Darby v. Hawk-Sawyer*, 405 F.3d 942, 943 (11th Cir. 2005).

This Court reviews issues of law related to the denial of a habeas relief under S2241 *de novo. Royal v. Tombone*, 141 F.3d 596, 599 (5th Cir. 1998). This Court reviews the district court decision not to conduct an evidentiary hearing for abuse of discretion. *United States v. Massey*, 89 F.3d 1433, 1443 (11th Cir. 1996). This Court also reviews pro se brief liberally. *Johnson v. Quarterman*, 479 F.3d 358, 359 (5th Cir. 2007).

SUMMARY OF ARGUMENTS

I. WHETHER THE DISTRICT COURT ERRED DENYING CHAPLIN'S §2241 HABEAS PETITION BASED ON THE SECOND PRONG OF *WOFFORD* WHERE CHAPLIN WAS SENTENCED UNDER THE ARMED CAREER CRIMINAL ACT BASED ON A NONEXISTENT PREDICATE OFFENSE, IN LIGHT OF THE RETROACTIVELY APPLICABLE SUPREME COURT DECISIONS *BEGAY* AND *CHAMBERS*?

Chaplin argues that the district court erred relying on the second prong of *Wofford* to deny his habeas petition because he meets the criteria for the second prong. Chaplin argues a due process violation because his sentence exceeds the statutory maximum as he was sentenced under the Armed Career Criminal Act based on a nonexistent predicate offense, in light of the retroactively applicable Supreme Court decisions *Begay* and *Chambers*. The district court's failure to allow Chaplin to proceed through the savings clause constitutes a suspension of the writ, in violation of the Constitution.

II. WHETHER THE DISTRICT COURT ERRED DENYING CHAPLIN'S HABEAS CORPUS PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING TO AFFORD CHAPLIN AN OPPORTUNITY TO PROVE HE IS ACTUALLY INNOCENT OF THE ACCA?

Chaplin argues that the Government and lower Court conceded that his underlying walk away escape is not a violent felony, so that question should not be relitigated in this appeal. However if despite the Government's waiver, this Court

were inclined to deny relief on the basis that Chaplin's underlying offense were a violent felony, then Chaplin argues that he is entitled to a limited remand to the District Court to be allowed to prove in an evidentiary hearing that his particular offense was not in fact a violent felony.

ARGUMENTS

I. WHETHER THE DISTRICT COURT ERRED DENYING CHAPLIN'S §2241 HABEAS PETITION BASED ON THE SECOND PRONG OF *WOFFORD* WHERE CHAPLIN WAS SENTENCED UNDER THE ARMED CAREER CRIMINAL ACT BASED ON A NONEXISTENT PREDICATE OFFENSE, IN LIGHT OF THE RETROACTIVELY APPLICABLE SUPREME COURT DECISIONS *BEGAY* AND *CHAMBERS*?

The district court committed reversible error denying Chaplin's § 2241 habeas petition based on the second prong of *Wofford* where Chaplin was sentenced to 235 months under the Armed Career Criminal Act enhancement provision based upon a nonexistent predicate offense, in light of the retroactively applicable Supreme Court decision. See *Wofford v. Scott*, 177 F.3d 1236, 1244-45 (11th Cir. 1999).[3] Chaplin is

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[3] The *Wofford* Court adopted the Seventh Circuit's approach on the savings clause. The Court stated: "We think the Seventh Circuit's [*In re*] *Davenport* [147 F.3d 605, 611 (7th Cir. 1998)] approach is better reasoned than those of the other circuits, and its rule has the advantage of being specific. We adopt it as it comports with the following holding: The savings clause of § 2255 applies to a claim when: 1) that claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense ; and, 3) circuit law squarely foreclosed such a claim a t the time it otherwise should have been raised in the petitioner's trial , appeal, or first § 2255

currently in custody, in violation of the Constitution or laws of the United States which is cognizable under habeas petition pursuant to 28 U.S.C. §2241(c)(3).

Unlike *Wofford*, Chaplin is relying on a retroactively applicable Supreme Court decision, *Chambers v. United States*, 129 S.Ct. 687 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *United States v. Shipp*, 589 F.3d 1084, 1089-90 (10th Cir. 2009)(*Chambers*, which involved a substantive rule of statutory interpretation, applied retroactively to habeas petitioner).

While discussing its second prong the *Wofford* Court stated:

> "We need not decide whether the savings clause extends to sentencing claims in those circumstances, or what a 'fundamental defect' in a sentence might be. It is enough to hold, as we do, that only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent,"

Wofford, 177 F-3d at 1244-45.

Under the facts of Chaplin's case, the savings clause is applicable. See *Goldman v. Winn*, 565 F.Supp.2d 200, 213 (D. Mass. 2008). In 1993 Goldman was sentenced as a Career Offender under U.S.S.G. § 4B1.1, because of two qualifying prior

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motion." *Wofford*, 177 F.3d at 1244.

convictions. One predicate offense was a 1977 conviction in the Massachusetts Superior Court for the alleged kidnaping of Jeffery Lopez. In 2001 the court vacated the kidnaping conviction. *Goldman*, 565 F.Supp.2d at 202-03. The *Goldman* court allowed the petitioner to proceed under section 2241 when the petitioner was able to demonstrate that he was actually innocent of one of the prior convictions (kidnaping) underlying the Career Offender enhancement. Id. at 228. Chaplin is actually innocent of the Armed Career Criminal Act enhancement provision based upon retroactively applicable Supreme Court decisions. *Chambers* and *Begay, supra.*

Chaplin presented a Fifth Amendment Due Process sentencing claim based upon retroactively applicable Supreme Court decisions, *Begay* and *Chambers*, which over turned Eleventh Circuit precedent. See, e.g., *United States v. Gay*, 251 F.3d 950 (11th Cir. 2001); *United States v. Harrison*, 558 F.3d 1280, 1284 (11th Cir. 2009); *United States v. Shipp*, 589 F.3d 1084, 1089-90 (10th Cir. 2009).

Construing Mr. Chaplin's *pro se* pleadings liberally, he is raising a due process challenge to the length of his sentence which exceeds the statutory maximum authorized by law based upon a retroactively applicable Supreme Court decision. Since *In re Winship*, 397 U.S. 358 (1970), the Supreme Court has "made clear beyond a peradventure that *Winship*'s due process [ ] protections extend, to some degree, to determinations that [go] not to a defendant's guilt or innocence, but simply to the

length of his sentence." *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Indeed, "due process requires [ ] that the sentence for the crime of conviction not exceed the statutory maximum." *United States v. Grier*, 475 F.3d 556, 573 (3d Cir. 2007).

Chaplin's offense of conviction of being a felon possession of ammunition under 18 U.S.C. §922(g)(1) carries maximum statutory penalty of ten years. See 18 U.S.C. §924(a)(2). See *Shipp*, 589 F.3d at 1088. Under the ACCA, defendants qualifying as "armed career criminals" are subject to a mandatory minimum prison term of fifteen years to life. See §924(e)(l); *Chambers*, 129 S.Ct. at 689, Relying in part on Mr. Chaplin's prior walk away escape conviction, the sentencing court concluded that Mr. Chaplin's three prior violent felonies made him an armed career criminal. As such, Mr. Chaplin was sentenced to 235 months' imprisonment, nine (9) years and seven (7) months over the statutory maximum for the offense of conviction. See §924(a)(2). The legal errors in Chaplin's case are fundamental and have resulted in a complete miscarriage of justice by causing Chaplin to be sentenced to an extra nine years and seven months for the Armed Career Criminal enhancement as to which he is actually innocent, based upon a retroactively applicable Supreme Court decision. *Chambers*, *supra*.

Chaplin is actually innocent of being an "Armed Career Criminal" and his sentence exceeds the statutory maximum ten (10) years which he has served and is

currently being restrained of his liberty, in violation of Fifth Amendment Due Process Clause of the United States Constitution. See *Shipp*, 589 F.3d at 1088; *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162, 171 (2nd Cir. 2000); *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999); *Haley v. Cockrell*, 306 F.3d 257, 265 (5th Cir. 2002).

The Circuits that have determined that the actual innocence exception may be extended to noncapital sentencing cases reason that the Supreme Court has stated that the purpose of the rule is grounded in equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. *See Haley*, 306 F.3d at 265 (quoting *Herrera v. Collins*, 506 U.S. 390 (1993)). It appears that the Eleventh Circuit had not addressed this issue until *Gilbert v. United States*, 609 F.3d 1159 (11th Cir. 2010), in which this Court held that a petitioner, who in light of *Begay v. United States*, 553 U.S. 137 (2008), who was "factually innocent" of a predicate offense required to have imposed an enhanced career offender sentence, was entitled to relief under *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999), and the savings clause of 28 U.S.C. §§ 2255 and 2241. *Gilbert v. United States*, 609 F.3d 1159, 1167 (11th Cir. 2010).[4] However, the Government's petition for rehearing *en*

[4] See also, *Flint v. Jordan*, 514 F.3d 1165, 1168 (11th Cir. 2008) ("We need not address whether and of *Wofford*'s other requirement are met, nor do we decide

banc was granted in *Gilbert* and the opinion vacated pending rehearing. *Gilbert v. United States*, __ F.3d __, 2010 WL 4340970 (11th Cir. November 3, 2010).

Chaplin's case is distinguishable from *Gilbert*, however, in that *Gilbert* involved a sentencing guideline enhancement which arguably did not cause Gilbert's sentence to exceed the statutory maximum, whereas Chaplin's error affects the Congressionally mandated statutory penalty. Although the Government has yet to file its brief in *Gilbert*, it is assumed that the Government's objection to *Gilbert* is not its treatment of *Wofford per se* in so far as the *Gilbert* panel purported to extend *Wofford* benefits to persons innocent only of a sentence, and not innocent of a "substantive" offense, but rather the Government's objection is assumed to be the application of that principle to a sentencing guideline error. Otherwise we believe the Governent has heretofore endorsed the innocent of the sentence analysis in other cases currently pending before this Court, notably, *United States v. Darian Antwan Watts*, 11th Cir. Case No. 07-14422, and *United States v. Demarick Hunter*, 11th Cir. Case No. 07-13701. We suggest that the application of *Wofford* in *Gilbert* to persons innocent of

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whether the savings clause could ever apply to a sentencing claim. See id. [*Wofford*] at 1245 ('It is enough to hold, as we do; that the only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent").

their sentence is well reasoned and suggest that this Court follow adopt the *Gilbert* panel analysis in that respect.

In Chaplin's case as in *Gilbert* the District Court denied relief to Chaplin finding that his *Begay* challenge to his predicate offense for his Armed Career Criminal sentence failed to satisfy the *Wofford* test. *Gilbert*, however, holds that a claim that a defendant's predicate offense no longer meets the definition of the required predicate crime of violence is factually innocent of his enhanced sentence, and that this satisfies the *Wofford* test permitting relief under the savings clause.

Chaplin was convicted on a single count indictment of violation of 18 U.S.C. § 922(g)(1) and § 924(e). The district court imposed a 235 month sentence on Chaplin under the Armed Career Criminal sentencing statute. But because Chaplin is not an Armed Career Criminal ("ACC"), in light of *Begay*, his statutory maximum sentence is ten years. Therefore under the *Gilbert* rationale, Chaplin is entitled to relief.

At the District Court the Government did not challenge the merits of Chaplin's *Begay* challenge to his ACCA sentence, but instead argued that Chaplin did not meet the *Wofford* test, and the Magistrate Judge and District Judge accepted that argument and denied relief solely on the basis that Chaplin could not satisfy the *Wofford* test. The District Court did *not* deny relief on the basis that Chaplin's prior conviction for a walk away escape was a violent felony, nor did the Government argue below that

Chaplin's walk away escape was a violent felony. The District Court's decision cited *United States v. Lee*, 586 F.3d 859 (11th Cir. October 26, 2009) (which held that a walk away escape under a New Jersey escape statute did not constitute a violent felony for ACCA purposes).

A separate panel of the Eleventh Circuit four days after *Lee* issued *United States v. Sanchez*, 586 F.3d 918 (11th Cir. October 30, 2009), which held that an escape under Florida Statutes, § 944.40 was a violent felony *for "three strike" purposes* under 18 U.S.C. 3559(c)(2)(F)(ii), and rejected the defendant's argument that his offense was properly charged under Florida Statutes, § 945.091(4). The *Sanchez* decision did not cite *Lee*, as to which it is arguably in conflict. In any event, *Sanchez* was not an ACCA case and is therefore distinguishable on that basis. Additionally, because the Government below did not challenge Chaplin's claim that his predicate offense failed to constitute a violent felony for ACCA purposes, the Government has waived that argument for purposes of appeal, and this Court should decide this case based solely on the *Wofford* issue.

Chaplin proved that Section 2255(h) provided an "Ineffective and Inadequate remedy" to challenge the legality of his detention based upon a retroactively applicable Supreme Court decision based on the substantive reach of a federal criminal statute. See *Lorentsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000);

Reyes-Reqiena v. United States, 243 F.36 853, 901-903 fn. 19, 23-29 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000); *Wofford*, 177 F.3d at 1244.

In *Triestman v. United States*, 124 F.3d 361, 377 (2nd Cir. 1997), the Second Circuit devised its savings clause test based on whether failure to permit a remedy would "raise serious constitutional questions." *Triestman*, 124 F.3d at 377. Whenever a judge believes "justice would seem to demand a forum for the prisoner's claim in so pressing a fashion as to cast doubt on the constitutionality of the law that would bar the § 2255 petition," the prisoner would be permitted access to habeas corpus writs. See id. at 378. Chaplin's case raises serious constitutional questions which should open the § 2241 savings clause for relief. *See Triestman* and *Goldman*, *supra*.

Failure to grant relief in Chaplin's case results in the suspension of the writ, in violation of the United States Constitution Article I, Section 9 Clause 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *United States v. Hayman*, 342 U.S. 205 (1952).

Based on the foregoing Chaplin submits that the *Wofford* second prong was met when Chaplin was sentenced under the ACCA based upon a nonqualifying predicate offense, in light of the retroactively applicable Supreme Court decisions in *Begay* and *Chambers*. Chaplin is actually innocent of being a ACCA and habeas relief should be

granted under the savings clause of § 2255(e).

II. WHETHER THE DISTRICT COURT ERRED DENYING CHAPLIN'S HABEAS CORPUS PETITION WITHOUT CONDUCTING AN EVIDENTIARY HEARING TO AFFORD CHAPLIN AN OPPORTUNITY TO PROVE HE IS ACTUALLY INNOCENT OF THE ACCA?

Chaplin has pled and the Government has not disputed that his underlying escape was a "walk away." Chaplin has pled and neither the Government nor the District Court disputed that his predicate offense was *not* a violent felony for ACCA purposes.

However, were this Court inclined to deny relief on the basis that Chaplin's underlying walk away escape was a violent felony, then Chaplin argues that it would be error to do so without first remanding the case to the District Court for an evidentiary hearing, at which Chaplin would be given the opportunity to prove that his offense did not involve conduct which involved violent force.

Chaplin argues that Florida Statutes, § 944.40 does not unambiguously establish that the required offense conduct involve violent force; therefore it is permissible to look to the record of the conviction to determine if violent force was an element of the underlying crime. When the law under which the defendant has been convicted contains statutory phrases that cover several different forms, some of which require violent force and some of which do not, the "'modified categorical approach'" has

been approved by this Court to determine whether the particular offense was or was not a violent felony. *United States v. Harris*, 608 F.3d 1222, 1225 (11th Cir. 2010), permits a court to determine whether a particular offense was a violent felony by consulting the trial record-including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms. Therefore if the nature of Chaplin's offense were to become an issue despite the Government's waiver of this argument below, then Chaplin requests that the Court direct a limited remand for purposes of determining the circumstances of his underlying offense before deciding whether it was or was not a violent felony.

CONCLUSION

Appellant James Chaplin respectfully requests this honorable Court to grant his requested relief and remand his case to the District Court for resentencing under 18 U.S.S.C. § 3553 and the United States Sentencing Guidelines, subject to the ten year statutory maximum penalty applicable under 18 U.S.C. § 922(g).

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief contains approximately 5,264 words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing has been furnished to James C. Stuchel, Esq., Assistant United States Attorney, Office of the United States Attorney, 100 Bull Street, Savannah, Georgia 31401, by United States Postal Service, first class mail, postage prepaid, this November 21, 2010. Adobe PDF format copies of this brief have been sent by e-mail to counsel for the co-appellants as a courtesy.

_____

William Mallory Kent