APPENDIX

TABLE OF CONTENTS

APPENDIX A

[FILED: JULY 7, 2025]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 23-2957

MICHAEL DEWAYNE LAIRY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 20-cv-144 — **Richard L. Young**, *Judge*.

ARGUED DECEMBER 5, 2024—DECIDED JULY 7, 2025

Before SYKES, *Chief Judge*, and ROVNER and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Michael Lairy petitioned for a writ of habeas corpus under 28 U.S.C. § 2255, claiming in part that he did not qualify for the Armed Career Criminal Act's ("ACCA") mandatory 15-year sentence, 18 U.S.C. § 924(e)(1), and that his counsel was ineffective for failing to raise this issue. The government did not address the underlying merits of Lairy's claims but asserted that he raised them after the statute of limitations had expired.

The district court held Lairy to his untimeliness and denied his petition. In so doing, the court rejected Lairy's arguments that the government forfeited the statute of limitations defense, he was actually innocent of ACCA, and he was entitled to equitable tolling.

For the reasons below, we agree with the district court's evaluation of forfeiture and disposition on actual innocence. But the district court abused its discretion by rejecting equitable tolling without first conducting an evidentiary hearing. We therefore vacate the denial of the petition and remand to the district court to conduct an evidentiary hearing on equitable tolling.

I. Background

In 2018, Michael Lairy pleaded guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). At the time of his sentencing, the offense ordinarily carried a statutory maximum sentence of ten years. § 924(a)(2) (2018 ed.). But a defendant faces a more severe punishment—a statutory minimum sentence of 15 years—if he qualifies for the ACCA enhancement. A defendant qualifies for ACCA when he "has three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another …." 18 U.S.C. § 924(e)(1).

The parties initially believed Lairy's prior convictions qualified as predicate offenses for ACCA because he had three cocaine-distribution convictions in Indiana that were thought to be "serious drug offenses." Relying on these convictions, the district court sentenced Lairy to 15 years in prison. Lairy's counsel did not object to the application of ACCA during the plea or sentencing process, and Lairy did not appeal.

Two years later, in June of 2020, Lairy filed a pro se petition for habeas corpus under 28 U.S.C. § 2255, citing the Supreme Court's decision in *Rehaif v. United States*, 588 U.S. 225 (2019), as grounds for relief. In *Rehaif*, the Court held that the government must prove "the defendant knew he possessed a firearm and … belonged to the relevant category of persons barred from possessi[on]." *Id.* at 237. Lairy amended his petition the following year—in March 2021—to develop this claim.

After pressing his *Rehaif* claim across five pages in his amended petition, he wrote in all caps, "[a]lso at least one of Mr. Lairy's prior offens[e]s used as an Armed Career Criminal predicate to enhance the sentence may not qualify and violates due process." He underlined the preceding sentence and continued, "[a]t the time Mr. Lairy was sentenced the Ausa and counsel may have been aware that Mr. Lairy's prior conviction was NOT a valid predicate offense under ACCA." He further stated that "[t]he drug priors may also be in question as more research may be needed." Lairy then continued discussing how the Court's holding in *Rehaif* cast doubt on his plea agreement and asked the court to appoint counsel so he could further amend his petition.

The government focused its answer on the *Rehaif* claim, only briefly addressing Lairy's statements about ACCA. The government referred to his statement regarding ACCA as a "Vague Sentencing Assertion [that] is Unclear," and primarily argued that Lairy waived any ACCA claim because his statement raised a perfunctory question about his drug priors rather than a cogent argument. In a concluding sentence, the government also suggested that Lairy waived his right to challenge his conviction on collateral attack through his plea agreement, which only excepted claims related to

ineffective assistance of counsel, or procedurally defaulted the claim.

The district court agreed that Lairy's reference to ACCA was too vague and appointed Lairy counsel. With the benefit of counsel, Lairy submitted a supplemental memorandum explaining that his reference to ACCA encompassed two claims. He argued that his three Indiana cocaine convictions did not qualify as "serious drug offenses" under ACCA and that his counsel was ineffective for failing to explain this issue before allowing him to accept a 15-year sentence. Lairy grounded these arguments in a line of cases explaining that state drug offenses only count as ACCA predicates when there is a categorical match between the State's definition of the drug and that under federal law. *See United States v. Ruth*, 966 F.3d 642, 647 (7th Cir. 2020); *Shular v. United* States, 589 U.S. 154, 157–59 (2020). At least one district court found that Indiana's definition of cocaine does not match the federal definition because it includes a broader array of isomers. *See Alston v. United States*, No. 2:16-cv-00016-JMS-DLP, 2021 WL 82963, at *2 (S.D. Ind. Jan. 11, 2021).

The government did not—and has not since—addressed the merits of Lairy's ACCA or related ineffective assistance of counsel claim (together, "ACCA claims"). Instead, it invoked § 2255's one-year statute of limitations. *See* § 2255(f)(1). With respect to Lairy's ACCA claims, the statute of limitations began to run on July 2, 2018, when his conviction became final after his time to file an appeal expired, and ran out on July 2, 2019. But Lairy first referenced ACCA in March 2021, nearly two years late.

In the district court (as here), Lairy brought various arguments to try to avoid § 2255's statute of limitations.

He argued that the government waived or forfeited the statute of limitations defense by failing to raise it in response to his amended pro se petition. In the alternative, he argued that the statute of limitations did not bar his claim because he was actually innocent of ACCA or entitled to equitable tolling.

The district court rejected each of these arguments. It concluded that the government neither waived nor forfeited the statute of limitations defense by raising it for the first time in response to appointed counsel's briefing because Lairy "was just as much to blame" for the delay. The court then rejected Lairy's actual innocence argument. It explained that circuit precedent has never extended the actual innocence exception to claims of legal innocence. The court also expressed its concern that extending the actual innocence exception in this way would unduly undermine the statute of limitations. Finally, the court denied Lairy's equitable tolling contention, without mentioning an evidentiary hearing.[1]

The district court granted Lairy a certificate of appealability, and this appeal followed.

II. Discussion

Lairy does not dispute that his ACCA and ineffective assistance claims are untimely. He instead takes issue with the district court's analysis of forfeiture and actual innocence, along with its failure to conduct an evidentiary hearing on equitable tolling. We review issues of law de novo, factual findings for clear error, and the decision to forgo an evidentiary hearing for an abuse of discretion. *See Dekelaita v. United States*, 108 F.4th 960, 968 (7th

[1] Lairy's *Rehaif* claim is not before us.

Cir. 2024); *Martin v. United States*, 789 F.3d 703, 705–06 (7th Cir. 2015).

A. Forfeiture of the Statute of Limitations Defense

"[F]orfeiture is the mere failure to raise a timely argument, due to either inadvertence, neglect, or oversight." *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020); *Bourgeois v. Watson*, 977 F.3d 620, 631 (7th Cir. 2020) (applying this rule in the habeas context). When a party forfeits a defense by raising it too late, the district court may exercise its discretion and allow the defense if the plaintiff will not suffer prejudice by the delay. *Burton v. Ghosh*, 961 F.3d 960, 965 (7th Cir. 2020). Here, the district court did not conduct a prejudice analysis because it concluded the government had timely raised the statute of limitations in response to appointed counsel's explanation of Lairy's claims.

Generally, the failure to raise an affirmative defense in an answer evinces forfeiture. *See Anderson v. United States*, 981 F.3d 565, 571 (7th Cir. 2020). But this rule has exceptions. *See Burton*, 961 F.3d at 965 (failing to raise an affirmative defense in an answer does "not necessarily [render it] untimely and forfeited."). It is "[o]nly when the defense is asserted later than it should have been" that the defense is untimely. *Id.*

A party is not untimely in its assertion of an affirmative defense if it could not have "reasonably known of [its] availability … at the time of the answer." *Id.* This may be the case when a plaintiff's unclear or belated presentation of his claims results in the delay. *See Bourgeois*, 977 F.3d at 631 (finding no forfeiture when the petitioner's "undifferentiated presentation of the claims[] was just as much to blame" for the government's silence); *see also Blackmon v. Williams*, 823 F.3d 1088, 1100 (7th Cir. 2016) (same when a petitioner did not raise the basis

for an argument until a supplemental memorandum). Put simply, "an unpleaded defense is not forfeited when raised promptly once its availability becomes apparent." *Burton*, 961 F.3d at 967.

In this case, Lairy's unclear and belated presentation of his claims meant that the government could not have reasonably known of the availability of a statute of limitations defense at the time the government filed its answer. Lairy's petition merely stated that "[the] drug priors may also be in question as more research may be needed" and that a predicate conviction under ACCA "may not qualify and violates due process." These undeveloped sentences did not alert the government to Lairy's two grounds for relief: that his drug convictions were not serious drug offenses under the categorical approach and his counsel was ineffective for failing to raise this issue.

Lairy's grounds for relief impacted when the statute of limitations period began. Section 2255(f) imposes a one-year statute of limitations for habeas petitions that runs from the latest of one of four events. So, if Lairy intended to raise an ACCA claim premised on a newly recognized right, *see* § 2255(f)(3), the limitations period would have begun to run on a different date than if he had discovered new facts such as the vacatur of one of his drug convictions, *see* § 2255(f)(4). And if none of the other provisions in § 2255(f) applied, then the year would run from the date Lairy's judgment of conviction became final. § 2255(f)(1). Lairy's vague assertions, however, did not reasonably apprise the government of the basis of his ACCA claims, which would in turn inform it of the applicable statute of limitations provision.

In fact, the different provisions of § 2255(f) explain why Lairy's *Rehaif* claim was timely under (f)(3), while

what turned out to be his "drug prior" arguments were not under (f)(1). Lairy's brief mention of his drug priors in the middle of a developed *Rehaif* claim only served to further cloud the nature of his claims.

Lairy contends that the government should have known his claims were based on an isomer issue because this was his best argument and it was being raised in other cases at the time. But this misses the point. It is not the government's burden to create claims for Lairy and defend against what it decides is the best one. Rather, the government expressed that it did not know how to confront his vague ACCA assertion, and the district court agreed. Once appointed counsel explained Lairy's claims, the statute of limitations defense became "apparent" to the government, who then "raised [it] promptly." *See Burton*, 961 F.3d at 967.

The government's brief mention of procedural default and plea agreement waiver does not change our holding. Both of these defenses apply broadly. Lairy defaulted any claim he could have raised at trial or on direct appeal, and his plea agreement waived almost all challenges on collateral attack. To reasonably know of the availability of these defenses, then, the government only needed to know that Lairy did not mention the drug priors during his sentencing, that he did not appeal, and that he was now collaterally attacking his conviction and sentence.[2]

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[2] Although both defenses applied broadly to claims Lairy could have raised in his petition, the government's invocation of them further highlights the lack of clarity in Lairy's petition. The face of the plea agreement allowed Lairy to raise ineffective assistance claims, and a § 2255 petitioner may bring ineffective assistance claims for the first time on collateral review. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). While not determinative, the government's invocation of misplaced defenses in response to Lairy's ineffective

Nor do we liken Lairy's case to situations where the government raises the statute of limitations defense for the first time on appeal. In those cases, courts have expressed the irony or unfairness in holding the petitioner to a time bar while excusing the government's belated defense. *See, e.g.*, *Anderson v. United States*, 981 F.3d 565, 571–72 (7th Cir. 2020); *Cartwright v. United States*, 12 F.4th 572, 580–81 (6th Cir. 2021). Such concerns are not implicated here, where the district court even-handedly provided Lairy with an opportunity to clarify his reference to the drug priors by appointing counsel and allowed the government to fully respond to what these claims turned out to be.

We do not intend to suggest that the government avoids forfeiting its statute of limitations defense any time a pro se petitioner inartfully presents a claim. To the contrary, we readily foresee situations where the petition, though wanting in precision, reasonably apprises the government of this defense at the time of its answer. We hold only, under the limited circumstances here, which involve a single, undeveloped sentence on drug priors placed in the middle of another developed claim, that the government did not forfeit its statute of limitations defense.

We turn now to two concepts—actual innocence and equitable tolling—that Lairy invokes to get around the statute of limitations bar.

B. Actual Innocence Gateway

A habeas petitioner who demonstrates actual innocence may overcome a procedural bar, such as the statute of limitations. *See McQuiggin v. Perkins*, 569 U.S.

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assistance of counsel claim supports our assessment that Lairy's pro se ACCA claims were far less clear than he believed them to be.

383, 386 (2013); *Lund v. United States*, 913 F.3d 665, 667 (7th Cir. 2019). In this way, actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). The gateway's purpose is to avoid miscarriages of justice that result in the incarceration of innocent persons. *McQuiggin*, 569 U.S. at 392.

Lairy seeks to use the actual innocence gateway to access his time-barred ineffective assistance of counsel claim. To do so, he argues that he is actually innocent of ACCA because his Indiana cocaine convictions do not qualify as "serious drug offenses" under the categorical approach. Although simple on its face, this argument implicates several questions about the nature of actual innocence. We begin by addressing whether ACCA is a crime or sentencing enhancement. This in turn impacts whether we recognize and how we view the gateway.

Recall that ACCA requires three prior "violent felon[ies] or [] serious drug offense[s]" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The Supreme Court recently held that a jury must decide whether the prior offenses were committed on different occasions because this "fact-laden" inquiry impacts the maximum and minimum sentence a defendant faces. *Erlinger v. United States*, 602 U.S. 821, 825, 834–35 (2024). In Lairy's view, this transforms ACCA into a crime because the occasions inquiry is now an element the government must allege in

an indictment and that a jury must find beyond a reasonable doubt.[3]

True, a "core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime." *Alleyne v. United States*, 570 U.S. 99, 113 (2013). But Lairy overreads *Erlinger*, which "decide[d] no more than that" a jury must "resolve ACCA's occasions inquiry," *Erlinger*, 602 U.S. at 835, and Lairy does not challenge the occasions inquiry here. In *Erlinger*, the Supreme Court took care not to say more, and it did not recharacterize ACCA as a substantive crime. Nor did it address whether a jury must decide the separate issue Lairy raises—whether certain convictions qualify as serious drug offenses—because that issue was not raised in the case. Accordingly, determining "what crime, with what elements, the defendant was convicted of" remains the province of the judge under the Court's prior precedent. *Id.* at 838 (quoting *Mathis v. United States*, 579 U.S. 500, 512 (2016)); *see also Alleyne*, 570 U.S. at 111 n.1 (recognizing the narrow exception in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that allows judges to determine "the fact of a prior conviction").[4] Although this is the first time we have been directly presented with the question of whether *Erlinger* impacts how we view ACCA, we have continued to describe ACCA as imposing "enhanced penalties" post-

[3] The government asserts that *Erlinger* is not retroactive but failed to develop this argument. We therefore do not, and need not, decide this question today.

[4] We recognize that the Supreme Court has questioned this exception, but it still remains good law. *See Erlinger*, 602 U.S. at 837–38; *Agostini v. Felton*, 521 U.S. 203, 207 (1997) (courts of appeals should leave the Supreme Court "the prerogative of overruling its own decisions").

Erlinger. *United States v. Johnson*, 114 F.4th 913, 914 (7th Cir. 2024).[5]

Equipped with the understanding that ACCA remains a sentencing enhancement, we turn to Lairy's alternate argument that the actual innocence gateway nevertheless applies. The Supreme Court has not yet addressed whether a petitioner can be actually innocent of a non-capital sentence. *See Dretke v. Haley*, 541 U.S. 386, 391–92 (2004) (highlighting a "growing divergence of opinion" among the circuits but not resolving the issue). And Lairy and the government dispute what our caselaw says on this issue. *Compare Mills v. Jordan*, 979 F.2d 1273, 1278–79 (7th Cir. 1992) (accepting that a petitioner can avoid procedural default if he is actually innocent of a habitual offender sentence enhancement) *with Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (abrogating *Mills* at least in the context of successive petitions).

We need not settle this dispute today. Even assuming *Mills* applies to first-time petitioners in the way Lairy suggests, Lairy's argument fails because it is one of legal, not factual, innocence. Actual innocence "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Factual innocence certainly includes the petitioner presenting "new reliable

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[5] We are not alone in doing so. *See United States v. Valencia*, 137 F.4th 331, 333 (5th Cir. 2025) (referring to ACCA as "[t]his sentencing enhancement"); *United States v. Harvin*, No. 20-14497, 2024 WL 4563684, at *2 (11th Cir. Oct. 24, 2024) (per curiam) ("The ACCA does not create a separate offense, but merely provides for sentencing enhancements."); *United States v. Brown*, 136 F.4th 87, 96 (4th Cir. 2025) ("Clearly, the circumstances here do not involve the addition of *a new offense* to the indictment; it was, rather, the failure to allege in the indictment *but one element* of the ACCA sentencing enhancement to be decided by the jury.").

evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence ….” *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *McQuiggin*, 569 U.S. at 395 (emphasizing that the gateway applies to cases that involve “new evidence”). And more recently, some of our sister circuits have suggested that a subsequent change in the scope of the law that renders the petitioner’s conduct no longer criminal can open the gateway. *See, e.g.*, *Vosgien v. Persson*, 742 F.3d 1131, 1134–35 (9th Cir. 2014). Legal innocence, by contrast, can look like challenging the sufficiency of the evidence in the record. *See Mills*, 979 F.2d at 1279.

Here, Lairy does not provide new evidence demonstrating he did not commit his Indiana drug offenses or even challenge that he committed the drug offenses. Nor does Lairy suggest that a subsequent change in the law renders him innocent of ACCA. In fact, Lairy disavows any reliance on a change in the law in his reply brief, explaining that his claim can only rest on cases that pre-date his conviction and that *Ruth* “did not change the law.”[6]

Lairy instead contends that the district court misclassified his Indiana convictions as serious drug offenses because Indiana’s definition of cocaine includes a broader array of drug isomers than the federal definition. We now join several of our sister circuits in holding that the misclassification of a predicate offense for a

[6] Because Lairy disavows this theory, we once again do not answer whether a change in law can demonstrate actual innocence. *See Lund*, 913 F.3d at 667–68 (presenting this question but resting our holding on other grounds); *Gladney v. Pollard*, 799 F.3d 889, 897 (7th Cir. 2015) (same); *Cobbs v. United States*, ---F.4th---, No. 23-3140, 2025 WL 1762368, at *4–5 (7th Cir. June 26, 2025) (same).

sentencing enhancement is legal innocence that does not open the actual innocence gateway. *See United States v. Pettiford*, 612 F.3d 270, 283–84 (4th Cir. 2010) (explaining that the misclassification of an ACCA predicate is a "legal argument[,] … not cognizable as a claim of actual innocence"); *McKay v. United States*, 657 F.3d 1190, 1199 (11th Cir. 2011) (declining to "extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense"); *Damon v. United States*, 732 F.3d 1, 6 (1st Cir. 2013) (contesting "only the categorization of his prior conviction as a crime of violence" is "not plead[ing] 'actual innocence'"); *United States v. Vargas-Soto*, 35 F.4th 979, 1000 (5th Cir. 2022) (explaining that an argument that a prior conviction was not an "aggravated felony" supporting a sentencing enhancement is "at best legal innocence"); *see also United States v. Peterson*, 916 F. Supp. 2d 102, 106–07 (D.D.C. 2013) (stating that "an objection to the legal classification of [an] offense" cannot excuse untimely filing).

As Lairy pointed out during oral argument, the Ninth Circuit views misclassification arguments grounded in a retroactive intervening change in the law as factual innocence. *See Allen v. Ives*, 950 F.3d 1184, 1190 (9th Cir. 2020).[7] And the Eighth Circuit excused a petitioner's procedural default of an argument challenging the application of ACCA. *See Lofton v. United States*, 920 F.3d 572, 576–77 (8th Cir. 2019). We decline to adopt these approaches here, finding the decisions of the First, Fourth, Fifth, and Eleventh Circuits more persuasive.

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[7] The Ninth Circuit decided this in the context of the savings clause, 28 U.S.C. § 2255(e), which allows a federal prisoner to proceed under 28 U.S.C. § 2241 in a narrow set of circumstances not at issue here. *Jones v. Hendrix*, 599 U.S. 465 (2023), however, calls into question much of the savings clause caselaw upon which Lairy relies.

Lastly, Lairy argues that even if he cannot demonstrate actual innocence, his situation falls under a broader exception for miscarriages of justice. But to support this argument, Lairy cites caselaw involving the savings clause and cognizability on collateral review. *See, e.g.*, *Guenther v. Marske*, 997 F.3d 735, 742 (7th Cir. 2021) (savings clause); *Narvaez v. United States*, 674 F.3d 621, 630 (7th Cir. 2011) (cognizability). Caselaw involving the savings clause is "inapposite." *White v. United States*, 8 F.4th 547, 557 (7th Cir. 2021). So too is caselaw about cognizability.

We therefore decline to extend the gateway to a petitioner challenging a sentencing enhancement based on a legal predicate misclassification argument. In so doing, we stay true to the Supreme Court's admonition that tenable gateway claims are "extremely rare" and for "extraordinary case[s]." *Schlup*, 513 U.S. at 321–22; *see also McQuiggin*, 569 U.S. at 395 (underscoring that the exception "applies to a severely confined category" of cases); *cf. Jones v. Hendrix*, 599 U.S. 465, 491 (2023) ("Undoubtedly, *McQuiggin*'s assertion of equitable authority to override clear statutory text was a bold one.").

C. Evidentiary Hearing on Equitable Tolling

Finally, we turn to Lairy's argument that the district court should have conducted an evidentiary hearing on equitable tolling. We review a district court's decision to forgo an evidentiary hearing for an abuse of discretion, emphasizing that "an error of law is, by definition, an abuse of discretion." *Mar-tin*, 789 F.3d at 705–06.

Equitable tolling can excuse a federal habeas petitioner's untimely filing under § 2255's one-year limitations period. *Ademiju v. United States*, 999 F.3d 474, 477 (7th Cir. 2021). Although equitable tolling is rare,

it is not a "chimera—something that exists only in the imagination." *Carpenter v. Douma*, 840 F.3d 867, 870 (7th Cir. 2016) (quoting *Socha v. Boughton*, 763 F.3d 674, 684 (7th Cir. 2014)). To receive the remedy of equitable tolling, a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted).

When a petitioner's allegations supporting equitable tolling are vague or conclusory, or when "the files and records of the case *conclusively* show that the prisoner is entitled to no relief," the district court need not conduct an evidentiary hearing. 28 U.S.C. § 2255(b) (emphasis added); *Mayberry v. Dittmann*, 904 F.3d 525, 532 (7th Cir. 2018). But an evidentiary hearing is necessary when a petitioner alleges facts that, if true, would entitle him to relief. *Mayberry*, 904 F.3d at 532. A petitioner's burden for receiving an evidentiary hearing is therefore "relatively light." *Torres-Chavez v. United States*, 828 F.3d 582, 586 (7th Cir. 2016).

Here, the record lacks any indication that the district court considered whether it should conduct an evidentiary hearing. The district court did not mention an evidentiary hearing, Lairy's request for one, or the standard under § 2255(b). We are troubled by these omissions. Instead of asking whether Lairy's allegations, if true, would entitle him to relief, it appears the district court construed evidentiary gaps against Lairy.

Lairy sought equitable tolling because he claimed he was in lockdown for the majority of the one-year filing period, for many months after his filing period ended, and once again in March 2020 due to the COVID-19 pandemic. He also explained that he lacked access to the law library

during these lockdowns and that, despite his repeated requests to his former counsel, he only received access to some of his case files a day before filing his amended petition mentioning ACCA. Lairy supported these allegations with letters describing these circumstances.

But the district court viewed this as "no evidence" because he did not state how long the COVID-19 lockdowns lasted, describe what law library and other limitations he faced, or explain why he needed his case file from his former counsel. An evidentiary hearing could have addressed these precise questions. *See Weddington v. Zatecky*, 721 F.3d 456, 464–65 (7th Cir. 2013) (requiring an evidentiary hearing on a petitioner's access to legal materials when the "record presents factual issues"); *Estremera v. United States*, 724 F.3d 773, 775–77 (7th Cir. 2013) (explaining that an evidentiary hearing would have been necessary to learn whether the petitioner pursued his rights diligently).

What is more, the answers to the issues the district court raised may very well result in a meritorious equitable tolling argument. All of the circumstances Lairy alleged are relevant considerations for equitable tolling. *See Socha*, 763 F.3d at 684–88. And equitable tolling is a fact specific inquiry. *Id.* at 686. Indeed, we cannot apply its legal standard when "we have no idea what happened." *Estremera*, 724 F.3d at 775.

The record does not "conclusively show that [Lairy] is entitled to no relief." 28 U.S.C. § 2255(b). So the district court should have conducted an evidentiary hearing to fill in factual gaps rather than overlook the inquiry altogether or resolve the gaps against him. We therefore remand to the district court to conduct an evidentiary hearing on equitable tolling.

III. Conclusion

From time to time, we are reminded of the "stark reality that the limitations on habeas corpus relief can have very real and lasting consequences for prisoners laboring to navigate its complexities." *Worman v. Entzel*, 953 F.3d 1004, 1005 (7th Cir. 2020). This case serves as one of those reminders. Lairy is serving additional time in prison that no one disputes would be improper if he were sentenced today. But he brought his ACCA claims too late, and the government did not forfeit its statute of limitations defense.

Without access to the actual innocence gateway, Lairy must rely on equitable tolling. On remand, the district court shall conduct an evidentiary hearing to determine Lairy's eligibility for equitable tolling. We therefore VACATE the denial of Lairy's habeas petition and REMAND to the district court to conduct an evidentiary hearing for the issue of equitable tolling. We AFFIRM the judgment in all other respects.

APPENDIX B

[FILED: SEPTEMBER 27, 2023]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

MICHAEL DEWAYNE LAIRY, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	No. 3:20-cv-00144-RLY-CSW

Order Discussing Motion for Relief Pursuant to 28 U.S.C. § 2255 and Granting Certificate of Appealability

Michael Lairy pleaded guilty in 2018 to being a felon in possession of a firearm. He now asks the court to vacate his plea and his indictment pursuant to 28 U.S.C. § 2255 and *Rehaif v. United States*, 139 S.Ct. 2191 (2019). Mr. Lairy also challenges the enhancement of his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his prior convictions for dealing cocaine. For the reasons explained in this Order, Mr. Lairy's § 2255 motion must be **denied** and the action dismissed with prejudice. In addition, the court finds that a certificate of appealability should issue.

I. The § 2255 Motion

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974). A court may grant relief from a federal conviction or sentence pursuant to § 2255 "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "Relief under this statute is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." *Blake v. United States*, 723 F.3d 870, 878-79 (7th Cir. 2013) (citing *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996); *Barnickel v. United States*, 113 F.3d 704, 705 (7th Cir. 1997)).

II. Factual Background

On October 27, 2016, a grand jury indicted Mr. Lairy with one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). *United States v. Lairy*, 3:16-cr-57-RLY-MPB-1 (Cr. Dkt.) dkt. 1. His indictment asserted:

> On or about August 15, 2016, in Vanderburgh County, in the Southern District of Indiana, MICHAEL D. LAIRY, defendant herein, did knowingly possess in commerce and affecting commerce a firearm and ammunition, to wit: a Hi Point CF380, .380 caliber pistol, bearing serial number P8066310, and fifty-six rounds of .380 ammunition, after having been convicted of one or more crimes punishable by a term of

> imprisonment exceeding one (1) year, to wit: a felony Escape in Vanderburgh County, Indiana under cause number 82D02-0601-FC-00004 on or about April 5, 2006; two felony counts of Dealing in Cocaine in Vanderburgh County, Indiana under cause number 82D02-9911-CF-00942 on or about June 22, 2000, and a felony Dealing in Cocaine in Vanderburgh County, Indiana under cause number 82D02-991-CF-947, on or about June 22, 2000.
>
> All of which is in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e).

Cr. Dkt. 1.

In February 2018, the parties filed a plea agreement. Cr. Dkt. 25. The plea agreement identified the following elements of the offense:

1. Before August 15, 2016, Mr. Lairy had been convicted of a crime that was punishable by a term of imprisonment of more than one year;
2. On or about August 15, 2016, Mr. Lairy knowingly possessed a firearm and ammunition; and
3. The firearm and ammunition had traveled in interstate commerce prior to his possession of it.

Cr. Dkt. 25 at 2. Mr. Lairy stipulated to a factual basis for the plea, including:

> Lairy's criminal record includes convictions for felony Escape in Vanderburgh County, Indiana under cause number 82D02-0601-FC-00004 on or about April 5, 2006; two felony counts of Dealing in Cocaine in Vanderburgh County, Indiana under cause number 82D02-9911-CF-00942 on or about June 22, 2000, and a felony Dealing in

> Cocaine in Vanderburgh County, Indiana under cause number 82D02-991-CF-947, on or about June 22, 2000.

Id. at 8. Based on these prior convictions, the parties agreed that Mr. Lairy was subject to a minimum sentence of 15 years under the ACCA, which provides for this sentence enhancement when the defendant has three prior convictions for "serious drug offense[s]" or "violent felonies." *Id.* at 1-2. The parties therefore agreed to a 180-month sentence. *Id.* at 4. And Mr. Lairy agreed that he would not challenge his conviction or sentence either on direct appeal or through § 2255. *Id.* at 10-11. This waiver did not include claims that he received ineffective assistance of counsel. *Id.*

The probation office then completed a presentence report (PSR). Cr. Dkt. 30. Among other things, the PSR concluded that, as stated in the plea agreement, Mr. Lairy was an armed career criminal under 18 U.S.C. § 924(e), based on his three prior convictions for dealing in cocaine. *Id.* ¶ 23. The PSR further noted that Mr. Lairy had been sentenced to 10 years' imprisonment for each of his dealing in cocaine convictions. *Id.* ¶ 33, 34. He also had several other prior convictions for which he was sentenced to more than a year in prison. *See id.* ¶ 31 (36 months for possession of a controlled substance); ¶ 36 (4 years for escape).

The court accepted Mr. Lairy's guilty plea and sentenced him to 180 months' imprisonment. Cr. Dkt. 33. Mr. Lairy did not appeal. He then filed this § 2255 motion.

III. Discussion

In this § 2255 motion, Mr. Lairy challenges his indictment and guilty plea in light of *Rehaif*. He also challenges the enhancement of his sentence under the ACCA.

A. *Rehaif*

The court understands Mr. Lairy to argue that his indictment was defective and that his plea was not knowing and voluntary because he was not informed that the government would have to prove that he knew of his previous felony convictions. Neither argument is supported by the post-*Rehaif* decisions of the Supreme Court or the Seventh Circuit.

Before proceeding, the court addresses two issues that apply to both *Rehaif*-related arguments. First, the United States argues that Mr. Lairy's motion is barred by the waiver provision in his plea agreement and procedurally defaulted. Because Mr. Lairy's *Rehaif* arguments are straightforward and clearly fail, the court declines to address these issues and instead resolves this claim on the merits. Second, Mr. Lairy does not actually dispute that he possessed a firearm in 2016 or that he knew at the time that he had previously been convicted of offenses punishable by over a year in prison. The record leaves no doubt that Mr. Lairy knew of his status as a repeat felon, and that certainty undermines his claims to relief under *Rehaif*.

The Supreme Court held in *Rehaif* that to be convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g), a person must know that he or she belongs to a group covered under the statute barring possession of firearms. 138 S.Ct. at 2194. The portion of the statute under which Mr. Lairy was convicted, §

922(g)(1), applies this prohibition to anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Mr. Lairy argues that his guilty plea is invalid under *Rehaif* because he did not know he was a felon at the time he possessed a firearm.

1. Indictment

To be legally sufficient, an indictment must state all elements of the crime charged, adequately inform the defendant of the nature of the charge so he can prepare a defense, and allow the defendant to plead the judgment as a bar to future prosecution. *United States v. White*, 610 F.3d 956, 958 (7th Cir. 2010). "An alleged flaw in the indictment is a plain error only when the indictment fails as a result 'to charge the offense by any reasonable construction.'" *United States v. Maez*, 960 F.3d 949, 964–65 (7th Cir. 2020) (quoting *United States v. Frank Smith*, 223 F.3d 554, 571 (7th Cir. 2000)). A challenge to the indictment is essentially an assertion that the grand jury would not have indicted the defendant but for the error. *See Maez*, 960 F.3d at 966 ("Considering the evidence heard by the trial jury and Battiste's extensive prior criminal history laid out in detail in his PSR, 'we can be confident in retrospect that the grand jury (which acts under a lower burden of persuasion) would have reached the same conclusion.'") (quoting *United States v. Patterson*, 241 F.3d 912, 914 (7th Cir. 2001)).

Mr. Lairy argues that his indictment was constitutionally insufficient because it did not state all the elements of his charge in light of *Rehaif*. It charged Mr. Lairy with (a) being a felon and *knowingly* possessing a firearm, rather than (b) *knowingly* being a felon and possessing a firearm. *See* Cr. Dkt. 1.

The language in Mr. Lairy's indictment is functionally identical to language the Seventh Circuit considered in *Maez*. In *Maez*, the Court of Appeals assumed for purposes of that case that omitting the knowledge requirement from the previous-conviction element was plain error. 960 F.3d at 966. Even so, it declined to exercise discretion to correct the error because it was "clear that the wording of the indictment did not undermine the fairness or integrity of judicial proceedings," considering that the defendant's criminal history was extensive and well documented. *Id.*

That reasoning applies in this case. The defendant in *Maez* carried four felony convictions into his felon-in-possession trial, and he actually served at least a year in prison on three of them. *Id.* at 965–66. Mr. Lairy also had several felony convictions before his indictment in this case, and he served over a year in prison for several of them. Cr. Dkt. 30 ¶ 23, 31, 33, 34, 36.

In sum, Mr. Lairy has identified a defect in his indictment that brings it out of step with *Rehaif*. But he has not presented a plausible, good faith reason to doubt that a grand jury would have declined to indict him if presented with post-*Rehaif* charging language. Therefore, the error in his indictment does not produce an extraordinary situation or a miscarriage of justice warranting relief under § 2255. *Blake*, 723 F.3d at 878–79.

2. Guilty Plea

"It is without question that a defendant's guilty plea must be knowing and voluntary." *United States v. Gonzalez*, 765 F.3d 732, 741 (7th Cir. 2014). "A defendant does not enter a plea voluntarily and knowingly if he pleads guilty to a crime without knowledge of the crime's essential elements." *United States v. Ali*, 619 F.3d 713, 719 (7th Cir. 2010).

Mr. Lairy asserts that he was never informed that the government would be required to prove that he knew he was a convicted felon in order to convict him as a felon in possession. As a result, he argues, he did not enter his plea knowingly and voluntarily.

But Mr. Lairy "has the burden of showing that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a 'reasonable probability' that he would not have pled guilty." *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021). "In a felon-in-possession case where the defendant was in fact a felon when he possessed firearms, the defendant faces an uphill climb." *Id.* at 2097. "The reason is simple: If a person is a felon, he ordinarily knows he is a felon." *Id.* "Thus, absent some reason to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he *was* a felon." *Id.* (emphasis in original). "A defendant considering whether to plead guilty would recognize as much and would likely factor that reality into the decision to plead guilty." *Id.*

Mr. Lairy does not deny that he knew in 2016 that he was a repeat felon with multiple sentences exceeding one year. His numerous, readily available felony records would have made it impossible to credibly appeal to a jury that he was oblivious to that reality. Mr. Lairy has again identified a defect in his proceeding, but he has not provided any basis to infer that he would not have pleaded guilty if charged and advised consistent with *Rehaif*. He therefore is not entitled to relief on his *Rehaif* claim.

B. Sentencing

For his second claim, Mr. Lairy states that at the time he "was sentenced the AUSA and counsel may have been aware that Mr. Lairy's prior conviction was not a valid predicate offense under [the Armed Career Criminal

Act]." Dkt. 12 at 6. He then references his prior escape conviction and "the drug priors." *Id.* In response to these assertions, the United States argued that this "vague sentencing assertion is unclear." Dkt. 22 at 12. Agreeing that Mr. Lairy's argument was vague, the court directed its further development, dkt. 23, and appointed counsel filed a brief discussing this claim, dkt. 27. Counsel did so, explaining that Mr. Lairy's prior cocaine convictions should not have been used to enhance his sentence under the ACCA and that his counsel performed deficiently by failing to challenge this enhancement.

Indeed, Mr. Lairy is correct that his prior Indiana convictions for dealing cocaine are not "serious drug offenses" under the ACCA. *See Alston v. United States*, No. 2:16-cv-JMS-DLP, 2021 WL 82963, at *2 (S.D. Ind. Jan. 11, 2021). And it may be the case that counsel provided ineffective assistance by failing to present this argument even though there was not a case directly on point at the time. *See Bridges v. United States*, 991 F.3d 791, 804 (7th Cir. 2021) (explaining that there are circumstances in which defense counsel "may be obligated to make, or at least evaluate, an argument that is sufficiently foreshadowed in existing case law"); *but see Harris v. United States*, 13 F.4th 623 (7th Cir. 2021) (counsel's decision not to risk a favorable plea agreement in favor a novel challenge to predicate offenses was objectively reasonable).

Thus, the United States does not challenge the merits of Mr. Lairy's claim but argues that it is barred by the statute of limitations. Mr. Lairy opposes the United States' statute of limitations defense and further argues that he is nonetheless entitled to raise this claim based on his actual innocence.

1. Statute of Limitations

The Anti-Terrorism and Effective Death Penalty Act of 1996 establishes a one-year statute of limitations period for § 2255 motions. 28 U.S.C. § 2255(f). The limitations period is triggered by the latest of four events:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Mr. Lairy's motion focused mostly on his *Rehaif* claim Dkt. 2. *Rehaif* is a new substantive rule, decided on June 21, 2019, that applies retroactively on collateral review. *See Louis v. United States*, 2022 WL 1165826, at *2 (W.D. Wis. April 20, 2022) (citing cases). Thus, under § 2255(f)(3), litigants like Mr. Lairy had until June 21, 2020, to file a motion to vacate. Mr. Lairy did so and thus his *Rehaif* claim was timely.

The United States argues, however, that any other challenge to his conviction and sentence does not fall under § 2255(f)(2), (3), or (4), and therefore is untimely. Here, Mr. Lairy's judgment of conviction was entered on the clerk's docket on June 18, 2018. Cr. Dkt. 34. He did not appeal, so his conviction became final on the last day he could have filed a notice of appeal, July 2, 2018. *Clay v. United States*, 537 U.S. 522, 527 (2003). Thus, the last day he could have filed a timely § 2255 motion was one year later, July 2, 2019. *See* § 2255(f). But Mr. Lairy did not file his § 2255 motion until June 16, 2020 (the date he signed it and stated it was correct in a letter to the Court). Dkt. 2.

Further, he did not amend his § 2255 motion to add a challenge to his sentence enhancement until March 8, 2021. Dkt. 12. While Mr. Lairy was granted an extension of time to file an amended § 2255 petition, dkt. 11, that Order had no impact on whether new claims presented in the amended motion would be timely. *See Mayle v. Felix*, 545 U.S. 644, 650 (2005) (holding that if claims in an amendment do not relate back, the new claims must independently meet the statute of limitations). Thus, Mr. Lairy's amendment, adding a challenge to his sentence enhancement, is nearly two years late under § 2255(f)(1).

Mr. Lairy does not deny that this claim is untimely, but contends that because the United States did not raise the statute of limitations defense when it initially responded to Mr. Lairy's petition, it waived or forfeited the defense. He goes on to argue that even if the United States did not waive or forfeit the defense, he is entitled to equitable tolling of the statute of limitations.

a. Waiver and Forfeiture

First, Mr. Lairy argues that the United States either waived or forfeited the statute of limitations defense.

> [W]aiver is the 'intentional relinquishment or abandonment of a known right,' and forfeiture is the mere failure to raise a timely argument, due to either inadvertence, neglect, or oversight." *Id.* at 786 (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). "In the criminal context," we noted, "the distinction between waiver and forfeiture is critical: while waiver precludes review, forfeiture permits a court to correct an error under a plain error standard." *Id.* In the civil context, we had been less clear about the role of plain error review.

Bourgeois v. Watson, 977 F.3d 620, 629 (7th Cir. 2020)

"The touchstone of waiver is a knowing and intentional decision." *United States v. Moody*, 915 F.3d 425, 429 (7th Cir. 2019) (citing *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005)). Thus, if Mr. Lairy cannot proffer a strategic justification for the United States' failure to raise the statute of limitations defense, the court will presume an inadvertent forfeiture rather than waiver. *Id.* The government advanced other procedural hurdles—the appeal waiver, procedural default, and waiver by perfunctory claim. Dkt. 2. No strategic reason existed for the government to rely on some, but not all, procedural hurdles. Accordingly, the government did not waive the issue. *Moody*, 915 F.3d at 429.

"Forfeiture results from 'inadvertence, neglect, or oversight.'" *Bourgeois*, 977 F.3d at 631 (quoting *Henry*,

969 F.3d at 786). The United States argues that it did not forfeit its statute of limitations defense because Mr. Lairy did not initially develop his sentencing claim adequately. Indeed, the Seventh Circuit has found that the government did not forfeit a defense to a habeas claim when the petitioner, "through his undifferentiated presentation of the claims, was just as much to blame…." *Id.* Here, in his initial petition, in support of his ACCA argument, Mr. Lairy simply stated that "the drug priors may also be in question as more research may be needed." Dkt. 12 at 6. While this claim was differentiated from Mr. Lairy's *Rehaif* claim, the court found that it required further development and directed that development. Dkt. 23. Like the petitioner in *Bourgeois*, Mr. Lairy "was just as much to blame" for any failure by the government to respond to this argument, and the government therefore did not forfeit the argument.

b. Equitable Tolling

Mr. Lairy argues that, even if the government is permitted to raise the statute of limitations defense, he is entitled to equitable tolling if he shows (1) that an extraordinary situation stood in his way of a timely filing and (2) that he pursued his rights diligently. *See Socha v. Boughton*, 763 F.3d 674, 683-84 (7th Cir. 2014).

In support of equitable tolling, Mr. Lairy argues that he remained in lockdown in USP Pollock for much of the one-year period he had under § 2255(f) because of various killings in USP Pollock's maximum-security facility. *See generally* dkt. 34-1 (several letters from Lairy to his mother explaining how he remained on lockdown for a vast majority of August 2018 to August 2019); *id.* at 15 (stating that a fight between other inmates "got us right back on lockdown AGAIN!" and that he had been in lockdown almost all of August 2018 through December

2018); *id.* at 17–21 (explaining the long lockdowns from December 2018 to April 2019); *id.* at 23 (explaining that he would be on lockdown from approximately April 2019 to August 2019 because two officers were stabbed by an inmate from Washington, DC). Mr. Lairy goes on to state that he remained in lockdown for months *after* the one-year period under § 2255(f) had ended. *Id.* And the beginning of the COVID-19 pandemic in March 2020 placed him on lockdown again. During that time Mr. Lairy could not visit the law library, use a computer, or call anyone during the lockdown periods. *See, e.g.*, *id.* at 2-3. Mr. Lairy also argues that counsel did not advise him of the statute of limitations to file a § 2255 motion, he requested his entire case file, but counsel did not timely provide it to him, and the first "isomer case" on which he bases his challenge to the enhancement of his sentence did not issue until late 2019.

Mr. Lairy has not shown that he is entitled to equitable tolling. Even assuming that the lockdowns at his facility between 2018 and 2019 and later COVID-19 lockdowns created an extraordinary situation that stood in his way, he has submitted no evidence that would support a conclusion that he could not, through reasonable diligence, raise his challenge until March of 2021. Notably, he does not state how long the COVID-19 lockdowns lasted or describe what law library or other limitations he faced during that time. Further, while he states that he did not receive the transcript of his criminal proceedings in a timely manner, he does not explain how this transcript was necessary for him to raise a challenge to the enhancement of his sentence.

2. Actual Innocence

Finally, Mr. Lairy argues that even if his claim is barred by the statute of limitations, the court nonetheless has the authority to resentence him to correct a fundamental miscarriage of justice because he is actually innocent of the career offender enhancement.

Mr. Lairy is correct that a defendant seeking relief under § 2255 may overcome a procedural bar—including the statute of limitations—by demonstrating actual innocence. *Lund v. United States*, 913 F.3d 665, 667 (7th Cir. 2019). "'A claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018) (quoting *Herrera v. Collins*, 506 U.S. 390, 404) ("[T]he actual innocence exception is one application of the broader 'fundamental miscarriage of justice' exception to procedural default intended to ensure that 'federal constitutional errors do not result in the incarceration of innocent persons.'" *Gladney v. Pollard*, 799 F.3d 889, 895 (7th Cir. 2015) (quoting *McQuiggin v. Perkins,* 569 U.S. 383, 392 (2013)).

Mr. Lairy explains that his actual innocence assertion does not form the basis of his claim, but merely acts as a gateway to allow him to assert his claim that his counsel rendered ineffective assistance by not challenging the inclusion of the ACCA enhancement in the plea agreement. But Mr. Lairy still has not shown that the actual innocence exception should apply to his claims. As the Seventh Circuit has explained, "[t]he actual innocence exception certainly applies where the petitioner has new evidence, like DNA evidence…but [the court] has never explicitly held that it can be used in situations where a

subsequent change to the scope of a law renders the conduct the petitioner was convicted for no longer criminal." *Lund*, 913 F.3d at 667-68 (citations omitted). And Mr. Lairy has not identified a case in which the actual innocence exception was applied to allow a petitioner to present an otherwise time-barred claim that his counsel rendered ineffective assistance by failing to dispute the propriety of a sentence enhancement under the ACCA. As the *Lund* court explained, expanding the actual innocence exception in this manner "would completely undermine the statute of limitations…." *Id.* at 668. Mr. Lairy therefore has not shown that he is entitled to apply the actual innocence exception to overcome his failure to file his claim within the statute of limitations.

IV. Conclusion

For the reasons explained in this Order, Michael Lairy is not entitled to relief on his § 2255 motion. Accordingly, his motion for relief pursuant to § 2255 is **DENIED**, and this action is **DISMISSED with prejudice**. Mr. Lairy's motion to file response, dkt. [37], is **GRANTED** to the extent that the response was considered.

Judgment consistent with this Order shall now issue and the Clerk shall **docket a copy of this Order in No. 3:16-cr-57-RLY-MPB-1.** The motion to vacate, Crim. Dkt. [37], shall also be **terminated** in the underlying criminal action.

V. Certificate of Appealability

A habeas petitioner does not have the absolute right to appeal a district court's denial of his habeas petition, rather, he must first request a certificate of appealability. *See Miller–El v. Cockrell*, 537 U.S. 322, 335 (2003); *Peterson v. Douma*, 751 F.3d 524, 528 (7th Cir. 2014). Mr.

Lairy's argument that he is entitled to apply the actual innocence exception to the statute of limitations defense appears not to have been definitively decided by the Seventh Circuit. *See Lund v. United States*, 913 F.3d 665, 667 (7th Cir. 2019). Pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing § 2255 proceedings, and 28 U.S.C. § 2253(c), the Court finds that Mr. Lairy has shown that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The Court therefore **GRANTS** a certificate of appealability on this issue and on the underlying ineffective assistance of counsel claim.

IT IS SO ORDERED.

Date: 9/27/2023

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distribution:

All Electronically Registered Counsel

APPENDIX C

[FILED: OCTOBER 28, 2022]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

MICHAEL DEWAYNE LAIRY, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	No. 3:20-cv-00144-RLY-MPB

Order Appointing Counsel and Directing Further Development

Petitioner Michael Lairy's motion for relief pursuant 28 U.S.C. § 2255 is under advisement. A review of the motion and the response reveals that appointment of counsel for the further development of Mr. Lairy's claims is necessary.

I. Issue Requiring Further Development

Among other things, Mr. Lairy argues in support of his § 2255 motion that when he "was sentenced the AUSA and counsel may have been aware that Mr. Lairy's prior conviction was not a valid predicate offense under [the Armed Career Criminal Act]." Dkt. 12 at 6. He then references his prior escape conviction and "the drug priors." *Id.*

While Mr. Lairy's sentence was not enhanced based on his previous escape conviction, a review of his

presentence investigation report reveals that he was understood to be subject to a statutory 15-year mandatory minimum sentence because of his prior convictions for dealing in cocaine. Cr. Dkt. 30 ¶ 23. Indiana convictions for dealing in cocaine have since been held not to qualify as serious drug offenses under the ACCA. *See Alston v. United States*, 2:16-cv-00016-JMS-DLP, 2021 WL 82963, at *2 (S.D. Ind. Jan. 11, 2021).

The United States did not address this argument, contending that it is too vague and unclear to confront. The court agrees that this argument requires further development.

Accordingly, pursuant to Rule 8 of the *Rules on Motions Attacking Sentence under Section 2555*, the Indiana Federal Community Defenders Office, Inc. ("IFCD") **is hereby appointed** to represent the petitioner in this action. The IFCD shall have **through November 23, 2022**, in which to appear. Should the IFCD be unable to represent the petitioner, substitute Criminal Justice Act counsel may appear on his behalf pursuant to 18 U.S.C. § 3006A(a)(2)(B).

II. Further Proceedings

As discussed above, counsel is appointed to represent Mr. Lairy to further develop his argument that his sentence was improperly enhanced. Counsel is directed to supplement the § 2255 motion as described above. The supplement should not simply adopt Mr. Lairy's argument, but should provide a thorough analysis of the claim the Court has identified.

Counsel shall file an appearance by **November 23, 2022** and shall file a supplemental brief by **January 3, 2023**. The United States shall have **twenty-eight days** to respond and counsel shall have **fourteen days** to reply.

IT IS SO ORDERED.

Date: 10/28/2022

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX D

[FILED: SEPTEMBER 10, 2025]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 10, 2025

Before

DIANE S. SYKES, *Chief Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 23-2957

MICHAEL DEWAYNE LAIRY, *Petitioner-Appellant*,	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division
v.	No. 3:20-cv-00144-FLY-CSW
UNITED STATES OF AMERICA, *Respondent-Appellee*.	Richard L. Young, *Judge*

ORDER

On consideration of appellant's petition for rehearing en banc, no judge in regular active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing en banc is **DENIED**.

APPENDIX E

Section 922 of Title 18 of the United States Code provides:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of

such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX F

Section 924 of Title 18 of the United States Code (in effect in 2018 when petitioner sentenced) provides:

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

> **(A)** knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
>
> **(B)** knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;
>
> **(C)** knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or
>
> **(D)** willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

> **(2)** Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.[*]

[*][Petitioner was sentenced before § 924 was amended in 2022 to impose a 15-year maximum sentence for violations of § 922(g). *See* Pub. L. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022) (amending 18 U.S.C. § 924(a)(2) and adding § 924(a)(8)).]

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or

ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

APPENDIX G

Section 924 of Title 18 of the United States Code provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

APPENDIX H

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) 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.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

> **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX I

[FILED: JUNE 23, 2020]

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT	District Southern District of Indiana 7th (Evansville)
Name (*under which you were convicted*): Michael Dewayne Lairy	Docket or Case No.: #3:16-cr-00057-RLY-MPB-1
Place of Confinement: Federal Correctional Institution McDowell	Prisoner No.: #15735-028
UNITED STATES OF AMERICA v.	Movant (*include name under which convicted*) Michael Dewayne Lairy

Motion

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
   U.S. District Court
   Southern District of Indiana (Evansville)

   (b) Criminal docket or case number (if you know):
   #3:16-cr-00057-RLY-MPB-1

2. (a) Date of the judgment of conviction (if you know):
   6-11-18

   (b) Date of sentencing: 6-18-2018

3. Length of sentence: Imprisonment for a term of 180 months with 3 years Supervised release and a special assessment of $100.00

4. Nature of crime (all counts):

   Count 1 – 922(g)(1) and Count 2 – 924(e)

5. (a) What was your plea? (Check one)
   (1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒ Plead Guilty

8. Did you appeal from the judgment of conviction? Yes ☐ No ☒

9. If you did appeal, answer the following:

   (a) Name of court:

   (b) Docket or case number (if you know):

   (c) Result:

   (d) Date of result (if you know):

   (e) Citation to the case (if you know):

   (f) Grounds raised:

   (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

   If "Yes," answer the following:

   (1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?
Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?
Yes ☐ No ☒

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☒

(2) Second petition: Yes ☐ No ☒

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

Currently filing 2255

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Seeking relief pursuant to Rehaif.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Plead Guilty in court.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Plead Guilty in court 922(g)(1) 924(e)

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Plead Guilty in court 922(g)(1) & 924(e)

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Plead Guilty in Court 922(g)(1) and 924(e)

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Plead Guilty in court 922(g)(1) and 924(e)

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

    (a) At the preliminary hearing: Attorney Chad Groves

    (b) At the arraignment and plea: Barry Blackard

    (c) At the trial: No Trial

    (d) At sentencing: Barry Blackard

    (e) On appeal: None

    (f) In any post-conviction proceeding: None

    (g) On appeal from any ruling against you in a post-conviction proceeding: None

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

    (a) If so, give name and location of court that imposed the other sentence you will serve in the future:

    (b) Give the date the other sentence was imposed:

    (c) Give the length of the other sentence:

    (d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as

contained in 28 U.S.C. § 2255 does not bar your motion.*

Filing Motion 2255 F4

Therefore, movant asks that the Court grant the following relief: Immediate Release or Re-sentencing

or any other relief to which the movant may be entitled.

None
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on June 16, 2018
(month, date, year)

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Executed (signed) on June 16, 2018 (date)

Michael Dewayne Lacy #15735-028
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

APPENDIX J

[FILED: MARCH 8, 2021]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

UNITED STATES OF AMERICA, v. MICHAEL DEWAYNE LAIRY, Petitioner,	)	Case No. 3:20-cv-00144-RLY-MPB

MOTION TO VACATE, SET ASIDE, CONVICTION AND SENTENCE, PURSUANT TO 28. U.S.C. 2255, REQUEST FOR APPOINTMENT OF COUNSEL, UNDER RULE 15. CIVIL PROCEDURE TO ADD, CLARIFY, AMEND, ADDITIONAL CLAIM'S, 18. U.S.C. 3006A(c), And ABRIGED MOTION TO VACATE CONVICTION AND SENTENCE, AND TO STAY, HOLD IN ABEYANCE IN LIGHT OF U.S. SUPREME COURT, *IN RE: UNITED STATES V. GARY,* U.S. __ __ (2020)

And Now Comes, the Petitioner-Submitter by and through as Special Appearance in the above captioned matter's, MR. Michael D. Lairy, , respectfully moves this Honorable Court for an order appointing counsel pursuant to 18. U.S.C. Section 3006A(c), to perform a preliminary review of the case in light of *United States v Rehaif*, 139. S. Ct. 2191 (2019) ,

1) In support thereof, MR. Lairy , states that he has previously been represented by court appointed counsel, and is unable to afford counsel to assist in the filing of a motion for relief under *Rehaif* and 28. U.S.C. 2255(f)(3), which invalidates the conviction and sentence under 922(g) as Unconstitutional, in violation of the Fifth and Sixth U.S. Constitution. As the Court did not have Jurisdiction to sentence or convict MR. Lairy , under 922(g) offense,

2) The Grand Jury in the present case did not find all the essential element's of the offense under 922(g), and the indictment failed to charge an offense under 922(g) therefore, the Court was with out Jurisdiction to sentence MR. Lairy , under an offense of 922(g) in which was never properly charged in the indictment at court ,

3) "In the interest of Justice" MR. Lairy , is unable to afford counsel, under 18. U.S.C. Section 3006A(c), the present issue under *Rehaif* present's complex issue's which counsel is needed to aid the Court as well as MR. Lairy , in presenting the issue thoroughly and completely. to obtain relief.

4) MR. Lairy , has filed a motion under 28. U.S.C. 2255(f)(3) in light of Rehaif, within a year of the U.S. Supreme Court's decision of a substantive interpretation of the statute under 922(g) which invalidates his conviction and sentence,

Federal Rule Civil Procedure 15,

5) under Rule 15, MR. Lairy , respectfully request to add, amend, clarify additional claim's within or outside the one year in which his motion was timely filed pursuant to 28. U.S.C. 2255(f)(3) and 2255(a) as the claim's presented

are challenging the constitutionality of the conviction, sentence and jurisdiction.

CERTIFICATE OF FILING AND SERVICE
Houston v Lack, 487 U.S. 266 (1988)("institutional mailbox rule")
"I certify that this document was given to prison officials, U.S. postage prepaid on this 4th day of March 2021, to U.S. District Clerk's of Courts, I certify under penalty of perjury that the foregoing is true and Correct, 28. U.S.C. 1746(1)

Mr. Michael Dewayne Lairy

MR. MICHAEL D. LAIRY,

Mr. Michael Dewayne Lairy

6) *U.S. v Thomas,* 221 F3d 430 (3rd cir 2000) Rule 15 provides, the submitter to add clarify, amend, amplify additional claim's or fact's filed within the 1-year statute of limitation's or after the one-year period expire's

ABRIDGED MOTION TO VACATE SENTENCE AND CONVICTION IN LIGHT OF, UNITED STATES SUPREME COURT DECISION, *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Pursuant to *Haines v Kerner*, 404 U.S. 519, 520 (1972) which direct's a court to hold pro se litigant's to less strigent standard's than those pleading's that are drafted by trained lawyer's.

Submitter files the instant Abridged Motion to Vacate to comply with the statute of limitation's in 28. U.S.C. 2255(f)(3), within one year of U.S. Supreme Court Ruling, Rehaif, and Request Appointment of Counsel, to

file an additional Amended Petition after a thorough review of Submitter's claim in light of Rehaif. Submitter further waives any time limitation's that appear to be imposed under Rule 4(b) of the rules governing section 2255 proceeding's to the extent that they, "Judge who receives the motion must promptly examine it." Submitter also acknowledges that the delay in setting forth a briefing schedule until after his supplemental motion is filed result's from his inexperience with the law, Request for Appointment of Counsel that is filed consecutively herewith, and the additional time needed to fully brief the Rehaif claim in order to file a supplemental motion.

ISSUE

Submitter, MR. Lairy , was indicted at count 1 , on federal charge of felon in possession of a firearm, The Court informed Submitter of the element's of the crime that the Ausa, would have to prove, which were:

1) that MR. Lairy , had "been convicted of a crime punishable for a term exceeding one year" (2) that Submitter "possessed" a firearm, (3) that the firearm "travelled in interstate or foreign commerce" and (4) that, he "did so knowingly; that is that [he] knew the item was a firearm and [his] possession of that firearm was Voluntary and intentional. Submitter was not informed that an additional element of the offense was that "he knew he had the relevant status when he possessed [the firearm]. Submitter was sentenced to 180 , month's under 18. U.S.C. 922(g)(1).

in *U.S. v Lockhart* 947 F3d 187 (4th cir 2020) stating that it was plain error to accept a guilty plea without the knowledge of one's prohibited status serving as a required

element of a 922(g) offense., In finding that the error affected his substantial right's, the court noted that a defendant "must show a reasonable probability that but for the error, he would not have entered the plea…

The Supreme Court has also recognized that a conviction based on a constitutionally invalid guilty plea cannot be saved" even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Dominguez Benitez v U.S.* 542 U.S. 74, 83. (2004) The Court went on to note that in *Bousley v U.S.* 523 U.S. 614 (1998), that "a guilty plea is constitutionally valid only to the extent it is voluntary and intelligent "In other case's the Supreme Court has held that a plea cannot be voluntary unless the defendant received 'real notice of the nature of the charge against him" *Henderson v Morgan*, 426 U.S. 637, 645-46 (1976)

In *Rehaif v U.S.* 139 S. ct. 2191 (2019), the Supreme Court overturned longstanding precedent and held that to convict under 922(g) and 924(a)(2), the government must prove the defendant both knew he possessed a firearm and knew he "belonged to the relevant category of person's barred from possessing a firearm" Id, 139 S. Ct. at 2200. In light of Rehaif, MR. Lairy , conviction and sentence for violating 18. U.S.C. 922(g) must be vacated and set aside because the sentence was imposed in violation of the Constitution and the laws of the United States and the Court was without Jurisdiction to impose such sentence 2255(a).

This petition is timely under 28. U.S.C. 2255(f)(3) because Submitter files it within one year of the Supreme Court's decision in *Rehaif*.

The Supreme Court abrogated longstanding Circuit precedent *U.S. v Lane*, , by expanding the knowledge requirement in 18. U.S.C. 922(g).

Title 18. United States Code 922(g) provides that "[i]t shall be unlawful" for certain individuals to possess firearm's. The provision list's nine categories of individuals subject to the prohibition. In Rehaif, the Supreme Court held that the government "must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of person's barred from possessing a firearm." Rehaif, 139 S. Ct. at 2200. In other words, an individual is not guilty of a 922(g) offense unless he had knowledge of his prohibited status within one of the nine categories under the statute at the time he possessed a firearm. Here, this means the government must establish that the submitter knew he was previously convicted of a crime punishable by more than one year in prison, and that he knew he was prohibited from possessing a fire arm at the time of the possession.

In so holding, Rehaif overruled controlling precedent from the seventh circuit, (as well as that of every federal court of appeals) that a defendant's knowledge of his prohibited status is not an element of a 922(g) offense. See *United States v Lane*, 267 F3d 715, 720, (7th cir 2001) *U.S. v Games-Perez*, 667 F3d 1136, 1142 (10th cir 2012): *U.S. v Rose*, 587 F3d 695, 705-06 & n9 (5th cir 2009): *U.S. v Bryant*, 523 F3d 349, 354 (D.C. cir 2008) *U.S. v Olender*, 338 F3d 629, 637, (6th cir 2003): *U.S. v Huet*, 665 F3d 588, 596 (3rd cir 2012): *U.S. v Kind*, 194 F3d 900, 907, (8th cir 1999): *U.S. v Miller*, 105 F3d 552, 555, (9th cir 1997): *U.S. v Jackson*, 120 F3d 1226 (11th cir 1997): *U.S. v Langley*, 62 F3d 602, 606 (4th cir 1995) (en banc): *U.S. v Smith*, 940 F2d 710, 713 (1st cir 1991):

Rehaif voids Submitter's 922(g) conviction

Rehaif voids MR. Lairy , 922(g) conviction secured through invalid plea agreement for several reason's.

First. Submitter's 922(g) conviction is invalid because it was secured through a defective indictment that failed to allege his knowledge of the relevant prohibited status as required under Rehaif. The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a Grand Jury" *U.S. v Lewis*, 802 F3d 449, 461 (3rd cir 2015)(en banc)(Smith, J, concurring)(quoting *Stirone v U.S.*. 361 U.S. 212. (1960).

"This guarantee is a basic right of criminal defendant's." Id (quoting *U.S. v Syme*. 276 F3d 131, 154 (3rd cir 2002). A Court cannot permit a defendant to be tried on charges that are not made in the indictment against him." Id at 462 (quoting *U.S. v. Vosburgh*. 602 F3d 512, 531 (3rd cir 2010). see also *Dunn v. U.S.* 442 U.S. 100, 106 (1979). ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends most basic notion's of due process.") In addition, the Sixth Amendment also provides that "[i]n all criminal prosecution, the accused shall enjoy the right… to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. "This right is violated when an indictment 'does not state the essential elements of the crime.'" Lewis. 802 F.3d at 462 (Smith. J.. concurring)(quoting United States v. Pirro. 212 F. 3d 86. 92 (2d Cir. 2000)(citing Russell v. United States. 369 U.S. 749. 761 (1962))).

Applying this law here, the indictment was defective because it fails to allege the Knowledge-of-status element of § 922(g); in turn the indictment fails to reflect a finding by the grand jury on this element. Therefore the indictment violated Petitioner's Fifth and Sixth Amendment rights to a grand jury and adequate notice of the charge against him. The defective indictment also stripped this Court jurisdiction.

Second. the evidence was insufficient to convict Petitioner of a § 922(g) offense because the government failed to present evidence at trial proving he knew of his prohibited status at the time he possessed the firearm. Based on the lack of evidence on this element. no rational trier of fact could have found guilt beyond a reasonable doubt. Therefore. Petitioner's conviction violates the Due Process Clause of the Constitution. See Jackson v. Virginia. 443 U.S. 307. 320-21 (1979).

Third, the trial court violated Petitioner's Sixth Amendment right to have a complete verdict on every element of the offense by failing to instruct the jury on the Knowledge-of-Status element of a § 922(g) offense. See Neder v. United States. 527 U.S. 1. 8-9 (1999)(a court commits a constitutional error when it omits an element of an offense from its jury instructions).

Each of these reasons independently requires a vacatur of Petitioner's conviction. The nature of the defect here, Where the mental state essential to guilt was not charged, not shown by the evidence, and not found by the jury, is the type of structural error that always invalidates a conviction. See United States v. Gonzalez-Lopez. 548 U.S. 140. 148 (2006) (denial of counsel of choice held structural error); United States v. Lewis, 802 F. 3d 449 (3d Cir. 2015)(en banc)(Smith, J., concurring). But even if

the error was not structural, Petitioner was prejudiced because there is a reasonable probability of a different outcome due to the error.

III. Rehaif is retroactively applicable to Petitioner's Case

Finally. Rehaif is retroactively applicable here. Under Teague v. Lane, 489 U.S. 288 (1989), a Supreme Court decision applies retroactively to cases on collateral review if it announces a rule that is "substantive." Welch v. United States. __ U.S. __, 136 S. Ct. 1257. 1264 (2016). A. decision is "Substantive" if it alters "the range of conduct or the class of persons that the law punishes." Id. at 1264-65 (citation omitted). "This includes decisions that narrow the scope of a criminal statute by interpreting its terms…." Id. at 1265 (citation omitted).

Rehaif is such a decision. Before Rehaif, the lower courts expansively interpreted § 922(g) to punish the possession of firearms by individuals who fell within a prohibited class. even if they did not know that they fell within the class at the time they possessed the firearm. Rehaif narrowed the scope of § 922(g) by interpreting it to knowledge of one's prohibited status at the time a firearm is possessed. In so doing, the Court altered the range of conduct and class of persons punishable under § 922(g). Therefore, Rehaif announced a substantive rule that is retroactive.

The Supreme Court's decision in Bousley v. United States, 523 U.S. 614 (1998), reinforces that Rehaif is retroactive. In Bousley, 523 U.S. at 620-21, the Supreme Court held that its decision in Bailey v. United States, 516 U.S. 137 (1995), was substantive, and therefore, retroactive. In Bailey, the Supreme Court construed 18 U.S.C. § 924(c)(1) which, at the time, only criminalized the

"use" or "carr[ying]" of a firearm during and in relation to a crime of violence. Previously, some lower courts had interpreted the "use" language in the provision to require only accessibility and proximity to the firearm, not active employment of the firearm. But in Bailev, the Supreme Court held that "active employment" of the firearm was required under § 924(c)(1). Bailey, 516 U.S. at 144. In Bousley, the Supreme Court ruled that Bailey announced a substantive (and therefore, retroactive) rule because it narrowed the scope of the § 924(c) Statute by holding that the statute "does not reach certain conduct" i.e., the non-active use of a firearm. Bousley, 523 U.S. at 620. Likewise, Rehaif announced a Substantive (and, therefore, retroactive) rule because it narrowed the scope of the § 922(a) statute by holding that it does not reach certain conduct and persons. i.e., the possession of a firearm by a defendant who, at the time, had no Knowledge of his prohibited status.

Hutto v Davis, 454 U.S. 370, 375, (1982) ("(U)nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be.") *Rehaif*

ALSO AT LEAST ONE OF MR. LAIRY's PRIOR OFFENS'S USED AS AN ARMED CAREER CRIMINAL PREDICATE TO ENHANCE THE SENTENCE MAY NOT QUALIFY AND VIOLATES DUE PROCESS

At the time MR. Lairy was sentenced the Ausa and counsel may have been aware that MR. Lairy's prior conviction was NOT a valid predicate offense under ACCA.

1) ESCAPE. – *United States v Mills*, 570 F3d 508 (2nd cir 2009) (noting escape defined by Conneticut law as including both affirmative escape from custody as well as failure to return to custody.

2) THE Drug prior's may also be in question as more research may be needed.

U.S. v Morales-Rosales, 838 F2d 1359, 1361-62 (5th Cir 1988) that criminal information… does not charge.. the second element of the offense… the failure of an information to charge an offense is jurisdictional defect that is not waived by a guilty plea.

UNDER RULE 11 THE PLEA MAY BE INSUFFICIENT AS WELL ANY WAIVER'S MUST BE KNOWING AND INTELLIGENT, VOLUNTARILY MADE PRIOR TO THE PLEA BEING ENTERED.

Federal Rule Criminal Procedure, Rule 11, requires full disclosure of the terms of the plea bargain, the plea must be knowing, voluntary with the advice of competent counsel, see *Tollet v Henderson* 411 U.S. 258, 263 (1973) *Bousley v U.S.*, 523 U.S. 614 (1998) ("If the record disclosed that at the time of the plea, neither the accused, nor his counsel, nor the district court correctly understood the essential elements of the crime with which he was charged, then the plea was invalid under the federal constitution")

MR. Lairy plea is invalid under Rehaif and violates Due Process the conviction and sentence is therefore void, unconstitutional and must be vacated with prejudice.

U.S. v Gary, (2020) is pending in the U.S. Supreme Court in which pose's a valid question in which may seriously impact the present case as to whether Rehaif error is a "structural error" in which there is a split amongst the circuit courts see *U.S. v Maez*, 2020 U.S. App. LEXIS 17196 (7th cir 2020) ('stating Rehaif claim fail's to present a structural error')

MR. Lairy seek's permission of the Court to hold, stay in ABEYANCE, the present case until the U.S. Supreme Court's decision in *U.S. v Gary*, which is expected in june 2021, in which MR. Lairy would like to, add, clarify or amend under Rule 15 pending U.S. Supreme Court's decision in the above mentioned case.

MR. Lairy request appointment of substitute counsel due to the fact of COVID-19 related issue's and the institution in which MR. Lairy is presently being held F.C.I-McDowell, has been on lockdown status and inmates have NO access to the Law Library or Legal material's in violation of MR. Lairy's Due Process "Access to the Court's."

MR. Lairy also admits that his Substantial right's have been violated which presents complex issue's and the appointment of counsel is needed to fully and thoroughly present the present Rehaif claim to the Court in which there is MERIT as shown above and RELIEF should be GRANTED. Due to constitutional and jurisdictional violation's.

[*Brady v U.S.*, 397 U.S. 742 (1970)]("Waiver's of Constitutional right's not only must be voluntary, but must be knowing, intelligent act's done with sufficient awareness of the relevant circumstances and likely consequence's")

The plea under 18. U.S.C. 922(g), could NOT have been valid in the present case as MR. Lairy was NEVER informed of all the essential elements of the offense by his counsel, the Court or the Ausa.

MR. Lairy request the unconstitutional conviction and sentence under 922(g) be vacated, and the indictment be dismissed with prejudice and MR. Lairy be discharged from imprisonment IMMEDIATELY.

United States v Brown, 995 F2d 1493, 1505 (10th Cir 1993) ("Failure of the indictment to allege all the essential elements of an offense… is a jurisdictional defect requiring dismissal…. The absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment")

U.S. v Inzunza. 638 F3d 1006, 1016-17 (9th cir 2011) ("A defective indictment is a structural flaw not subject to harmless error review") *United States v Harper*, 901 F2d 471, 472-73 (5th cir 1990) (not with standing guilty plea and not with standing that issue was raised for first time in postconviction proceeding. indictment's failure to charge offense was properly raised in section 2255 motion because alleged error is one that divest sentencing court of jurisdiction")

Petitioner present conviction and sentence under 18. U.S.C. 922(g) and 924(a)(2) is unconstitutional and Violates Due Process Petitioner ask the Court to stay, hold in Abeyance the present petition pending the U.S. Supreme Court grant of petition for writ of certiorari to the three below listed cases in relation to U.S. v Rehaif, and the issue presented in the present case.

The U.S. Supreme Court has granted a petition for writ in the following case's in which a meritable Rehaif claim has been presented in each case and may guide this Courts determination of a claim of merit in which relief can be granted, The Petitioner ask this Court to stay, hold in Abeyance the present petition pending the U.S. Supreme Court's decision in the following case's: In light of *U.S. v Rehaif*;

U.S. v Gary, No. 20-444__s.ct.__2021WL77245 (2021); *U.S v Nasir*, No. 18-2888, 982 F3d 144 (3rd cir 2020) (en banc) (Sup. ct.) *U.S. v Davis*, No. 19-1872. (Doc. No. 80) + 19-1873 (Doc. No. 81) (Sup. ct.) *Greer v U.S.*, No. 19-87, 09i__s.ct.__2021WL77241 (MEM) (2021)

WHEREFORE, Petitioner, MR. Lairy, Respectfully, pray and request the Court Appoint Substitute Counsel, based on the above "in the interest of justice," and to allow counsel to further Amend 2255 Petition under Rule 15, and to stay hold, in Abeyance in light of the above case's pending in U.S. Supreme Court and to Vacate Set aside Conviction and Sentence under 18. U.S.C. 922(g).

Respectfully Submitted,

Mr. Michael Dewayne Lairy

MR. MICHAEL D. LAIRY,

Mr. Michael Dewayne Lairy

CERTIFICATE OF FILING and SERVICE AFFIDAVIT

Houston v Lack, 487 U.S. 266 (1988)("mailbox institutional rule")

I declare and state that this document was deposited in the institutional mailbox by handing it to a correctional

officer on 4th day of March 2021, to the U.S. District CLERK'S of Court's, U.S. prepaid postage, to be filed and sent to the parties electronically.

I further certify under penalty of perjury that the fore going is true and correct to the best of my knowledge and belief under 28. U.S.C. 1746(1)

Mr. Michael Dewayne Lairy

MR. MICHAEL D. LAIRY,

Mr. Michael Dewayne Lairy

APPENDIX K

[FILED: JANUARY 19, 2023]

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

MICHAEL LAIRY, *Petitioner*,	)	
v.	)	3:20-cv-00144-RLY-MPB
UNITED STATES OF AMERICA, *Respondent*.	)	

Supplemental memorandum

This memorandum explains two claims that Michael Lairy raised in his amended motion under 28 U.S.C. § 2255. For the reasons below, Lairy's amended motion must be granted.[1]

Background

I. The criminal case

In October 2016, the government filed an indictment in Michael Lairy's criminal case. Criminal Dkt. 1. It alleged that Lairy possessed a firearm while a convicted felon and thus violated 18 U.S.C. § 922(g)(1). *Id.* at 1. Ordinarily, the statutory maximum sentence for violating

[1] This supplemental memorandum uses "Criminal Dkt." to cite documents within Lairy's criminal case (3:16-cr-00057-RLY-MPB-1). And it uses "Civil Dkt." to cite documents within Lairy's § 2255 case (3:20-cv-00144-RLY-MPB).

§ 922(g)(1) is 10 years of imprisonment (120 months). 18 U.S.C. § 924(a)(2). And ordinarily, Lairy's Guidelines range would be 51–63 months of imprisonment. *See* Criminal Dkt. 30 at 5, 15; United States Sentencing Guidelines ("U.S.S.G.") Chapter 5, Pt. A (sentencing table).

Yet the government offered a plea agreement that required Lairy to serve 180 months of imprisonment. Criminal Dkt. 25 at 4. The government offered the 180-month sentence because it claimed that Lairy's criminal history triggered a recidivist enhancement—called the Armed Career Criminal Act ("ACCA"). *Id.* at 1–2. ACCA could be triggered only if Lairy committed a combination of 3 "serious drug offense[s]" or "violent felon[ies]" in the past. 18 U.S.C. § 924(e)(1). To show that Lairy did, the government claimed that Lairy's 3 Indiana cocaine convictions from 1999 were "serious drug offenses" that triggered ACCA. Criminal Dkt. 1 at 1; Criminal Dkt. 30 at 5, 7.

If triggered, ACCA would dramatically change Lairy's statutory maximum sentence and Guidelines range. It would change Lairy's statutory *maximum* of 10 years' imprisonment (120 months) to a statutory *minimum* of 15 years' imprisonment (180 months). 18 U.S.C. §§ 924(a)(2), 924(e)(1). And ACCA would increase Lairy's Guidelines range from 51–63 months of imprisonment to 180–210 months. Criminal Dkt. 30 at 5, 15.

Based on his trial counsel's advice, Lairy accepted the government's plea agreement. *See, e.g.*, Criminal Dkt. 25 at 12, 14. He pleaded guilty while thinking that ACCA applied in his case and required at least a 15-year sentence. *See, e.g.*, *id.* at 1–2, 12, 14.

At Lairy's sentencing, this Court relied on Lairy's prior Indiana cocaine convictions to trigger ACCA. Criminal Dkt. 45 at 6. Lairy's trial counsel failed to object. *See id.* This Court then imposed the mandatory minimum 15-year sentence, but it suggested that sentence was too harsh. *See id.* at 16. It explained:

> This is a stiff sentence, Mr. Lairy, 15 years, but that's what Congress has determined is the sentence here for someone who has committed this crime and has the criminal history that [fits under ACCA]. I have no discretion to go below that. If I did, more than likely I would . . . .

Id.

Lairy has now served approximately 77 months out of the 180-month sentence imposed. Criminal Dkt. 30 at 1.

II. The civil case

Lairy proceeded *pro se* at relevant times in the instant civil action. Lairy first filed his original § 2255 motion while proceeding *pro se*. Civil Dkt. 1. He then filed a motion for additional time to amend his § 2255 motion. *See* Civil Dkt. 10. In that motion requesting additional time, Lairy explained that his upcoming and amended § 2255 motion would be based in part on his trial counsel's ineffective assistance. *See id.* at 1.

Lairy then filed the amended § 2255 motion while proceeding *pro se*. Civil Dkt. 12. In the amended § 2255 motion, Lairy stated that his prior convictions did not count under ACCA. *See id.* at 6. Lairy also stated that his trial counsel failed to explain that his prior convictions did not count under ACCA and allowed him to accept a 15-year sentence based on ACCA. *See id.*

The government then responded to Lairy's amended § 2255 motion. Civil Dkt. 22. It made three arguments in response to Lairy's ACCA claims. *Id.* at 12–14. First, the government argued that Lairy failed to fully develop the ACCA claims. *See id.* Second, it argued that his ACCA claims were waived because Lairy's plea agreement included a § 2255 waiver. *See id.* at 6–7, 14 (invoking Lairy's plea waiver and citing Part I.A of the government's response). Finally, it argued that Lairy's ACCA claims were procedurally defaulted because he failed to raise them in the district court or on appeal. *See id.* at 7–10, 14 (invoking procedural default and citing Part I.B of the government's response).

This Court subsequently ordered the Indiana Federal Community Defenders ("IFCD") to represent Lairy in this § 2255 action. Civil Dkt. 23 at 2. In that order, this Court stated the following:

> Mr. Lairy argues in support of his § 2255 motion that when he 'was sentenced the AUSA and [his trial] counsel may have been aware that Mr. Lairy's prior conviction was not a valid predicate offense under the [ACCA].' Dkt. 12 at 6. [Lairy] then references . . . 'the drug priors.'

Id. at 1.

This Court ordered that IFCD further explain Lairy's *pro se* claims involving ACCA and the "drug priors." *Id.* at 2. It pointed out that ACCA was triggered only because of Lairy's prior Indiana cocaine convictions. *See id.* at 1–2. And it pointed out that Indiana cocaine convictions have been "held not to qualify . . . under [] ACCA." *Id.* (citing *Alston v. United States*, No. 216CV00016JMSDLP, 2021 WL 82963, at *2 (S.D. Ind. Jan. 11, 2021)).

As explained below, Lairy should not have been sentenced under ACCA.

Argument

I. Lairy's prior Indiana cocaine convictions do not count under ACCA.

To trigger ACCA's enhancement, Lairy's criminal history must include a combination of 3 "serious drug offense[s]" or "violent felon[ies]." 18 U.S.C. § 924(e)(1). Throughout Lairy's criminal case, the government claimed that Lairy's 3 Indiana cocaine convictions were "serious drug offenses" under ACCA. *See* Criminal Dkt. 1 at 1; Criminal Dkt. 30 at 5, 7. But Indiana cocaine convictions are not serious drug offenses under ACCA. *Alston*, 2021 WL 82963 at *2–*3. Indeed, the government now routinely concedes that Indiana cocaine convictions do not count under ACCA. *E.g.*, *Henderson v. United States*, no. 2:20-cv-00402-JMS-DLP, Dkt. 21 at 5 (S.D. Ind. Sept. 9, 2022); *Pierson v. United States*, no. 1:21-cv-01264-JMS-MG, 2022 WL 1523325, at *2 (S.D. Ind. May 13, 2022).

A. The categorical approach governs the ACCA analysis.

A district court employs the categorical approach to determine if a person's prior state drug offense falls within ACCA's serious-drug-offense definition. *Shular v. United States*, 140 S. Ct. 779, 783–85 (2020); *Kawashima v. Holder*, 565 U.S. 478, 483–85 (2012). In this ACCA context, a district court uses the conduct-based categorical approach. *Shular*, 140 S. Ct. at 783–85; *Kawashima*, 565 U.S. at 483–85. The conduct-based approach "is simple" because it requires comparing the plain language of statutes. *United States v. Ruth*, 966 F.3d 642, 647–48 (7th Cir. 2020).

To employ that approach here, a district court compares the state drug offense with the federal enhancement provision. *See id.*; *United States v. De La Torre*, 940 F.3d 938, 950–52 (7th Cir. 2019). If the state drug offense's legal elements necessarily entail conduct described within the federal enhancement provision, the state offense counts under the federal enhancement provision. *See, e.g.*, *Ruth*, 966 F.3d at 647–48. But if the state drug offense's elements entail more conduct than the enhancement provision, the state offenses does *not* count under the federal enhancement provision. *See, e.g.*, *id.*

Note that the categorical approach is always about legal elements—never facts. *Mathis v. United States*, 579 U.S. 500, 509–10 (2016). The categorical approach prohibits a district court from considering how a person actually perpetrated the state drug offense in real life and then determining if those facts fall within the federal enhancement provision. *See id.*[2]

B. Lairy's prior Indiana cocaine convictions are not categorically serious drug offenses under ACCA.

This Court must apply the categorical approach to determine whether Lairy's prior Indiana cocaine convictions categorically fall within ACCA's serious-drug-offense definition. *See id.*; *Shular*, 140 S. Ct. at 783–85.

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[2] What is called the "modified categorical approach" applies when the prior statute of conviction is divisible into distinct crimes. *Mathis*, 579 U.S. at 505–06. Under that approach, the district court may glance at limited judicial documents in the prior case but only to determine which legal elements formed the basis of the prior conviction. *See id.* at 505–06. Because the modified categorical approach makes no difference here, it is not explained in detail. *See, e.g.*, *Ruth*, 966 F.3d at 649–50.

The legal elements below show that Lairy's prior Indiana cocaine convictions are not categorically "serious drug offenses" under ACCA.

1. Indiana's drug statutes

Indiana's relevant drug statutes are easy to digest here. Indiana Code § 35-48-4-1 prohibits a person from dealing "cocaine." At all relevant times, Indiana defined "cocaine" as "coca leaves and . . . any salt, compound, *isomer*, derivative, or preparation [that] is chemically equivalent." Ind. Code § 35-48-1-7 (1998) (emphasis added). The term "isomer" under Indiana law includes *any* isomer—at least optical isomers, geometric isomers, or positional isomers. *Alston*, 2021 WL 82963 at *2. The takeaway here is that Lairy's Indiana cocaine convictions could have involved *any* isomer—at least optical isomers, geometric isomers, or positional isomers. *See id.*; *Henderson*, Dkt. 21 at 5.

2. ACCA's serious drug-offense definition

ACCA's serious-drug-offense definition takes a little more effort to digest. In short, ACCA defines "serious drug offense" as a state drug offense that involves dealing a "controlled substance" as defined under the federal Controlled Substances Act ("CSA"). 18 U.S.C. § 924(e)(2)(A)(ii). The CSA deems "cocaine" a controlled substance. 21 U.S.C. § 812, Schedule II(a)(4) (2018). And the CSA defines "cocaine" as entailing *only* optical isomers or geometric isomers. *Id.*; *see also id.* § 802(14) ("As used in schedule II(a)(4) [which covers cocaine], the term 'isomer' means any optical or geometric isomer."). The takeaway here is that ACCA's serious-drug-offense definition covers state cocaine convictions that entail only optical isomers and/or geometric isomers. *Alston*, 2021 WL 82963 at *2.

3. An elementary comparison of the statutory texts shows that Indiana's cocaine statutes are broader than ACCA's serious-drug-offense definition.

With the statutory definitions above in mind, an elementary application of the categorical approach shows that Lairy should not have been subject to ACCA's enhancement.

Lairy's Indiana cocaine convictions could have included *any* isomer—at least (1) optical isomers, (2) geometric isomers, or (3) positional isomers. *See* Ind. Code § 35-48-1-7 (1998); *Alston*, 2021 WL 82963 at *2. Yet ACCA's serious-drug-offense definition covers state cocaine convictions that necessarily entailed *only* (1) optical isomers and/or (2) geometric isomers. *E.g.*, 21 U.S.C. § 802(14); *Alston*, 2021 WL 82963 at *2. "Because Indiana law includes positional isomers in its definition of cocaine, . . . it reaches broader than [ACCA]." *Alston*, 2021 WL 82963 at *2. "Accordingly, pursuant to *Mathis*, [Lairy's] sentence should not have been enhanced under [] ACCA based on his Indiana convictions for dealing in cocaine." *Id.* The government has conceded the same in multiple cases. *Pierson*, 2022 WL 1523325 at *2; *Henderson*, Dkt. 21 at 5.

In the end, Lairy's Indiana cocaine convictions do not *necessarily* entail conduct described within ACCA's serious-drug-offense definition. *Alston*, 2021 WL 82963 at *2 ("Because Indiana law includes positional isomers in its definition of cocaine, . . . it reaches broader than [ACCA]."); *see also Henderson*, Dkt. 21 at 5; *Pierson*, 2022 WL 1523325 at *2. So, under the categorical approach, Lairy did not have the required 3 prior offenses when he received a sentence based on ACCA. *Alston*, 2021 WL 82963 at *2.

II. Lairy's amended § 2255 motion must be granted.

Lairy filed his amended § 2255 motion while proceeding *pro se*. Civil Dkt. 12. So, it must be construed liberally. *Gaylord v. United States*, 829 F.3d 500, 505 (7th Cir. 2016); *United States v. Bandy*, No. 2:09-CR-125, 2013 WL 2940643, at *2–*3 (N.D. Ind. June 14, 2013).

In Lairy's amended § 2255 motion, he stated that his prior convictions did not fall under ACCA. Civil Dkt. 12 at 6. That is a straightforward claim for relief under § 2255. *Id.*; *see also* 28 U.S.C. § 2255(a); *Bandy*, 2013 WL 2940643 at *2. Lairy also stated that his trial counsel failed to explain that his prior convictions did not fall under ACCA and allowed him to accept a 15-year sentence based on ACCA. *See* Civil Dkt. 12 at 6; Civil Dkt. 10 at 1. That is an ineffective-assistance-of-counsel claim under the Sixth Amendment. *See, e.g.*, Civil Dkt. 12 at 6; Civil Dkt. 1 at 10; *Gaylord*, 829 F.3d at 505.

Lairy needs only one of those two claims to receive relief, but both are winners.

A. The § 2255 standard

Lairy may move to vacate his criminal sentence pursuant to 28 U.S.C. § 2255. Specifically, § 2255 allows Lairy to argue that his sentence violated either the Constitution, federal law, or exceeded "the maximum [sentence] authorized by law." 28 U.S.C. § 2255(a). If Lairy shows any of those 3 violations, "the [district] court shall vacate and set the judgment aside and shall discharge [Lairy] or resentence him." *Id.* § 2255(b).

This Court need not hold an evidentiary hearing before it grants Lairy's amended § 2255 motion. *Lomax v. United States*, No. 119CV03843SEBMPB, 2021 WL 490271, at *3 (S.D. Ind. Feb. 9, 2021), *aff'd*, 51 F.4th 222 (7th Cir. 2022) (granting the defendant's § 2255 motion

without an evidentiary hearing and resentencing the defendant when his prior Indiana cocaine convictions erroneously triggered ACCA); *see also Alston*, 2021 WL 82963 at *2–*3 (same). But this Court must hold an evidentiary hearing before it denies the amended § 2255 motion—unless both the record and the motion "conclusively show that [Lairy] is entitled to no relief." 28 U.S.C. § 2255(b).

B. Lairy's straightforward ACCA claim under § 2255 requires resentencing.

As explained above, Lairy's prior Indiana cocaine convictions did not trigger ACCA's enhancement. *Supra* pp. 5–8 (explaining that Indiana's drug statutes are broader than ACCA's serious-drug-offense definition). He should have been subject to a 10-year *maximum* sentence under 18 U.S.C. § 922(g)(1). *Id.*; 18 U.S.C. § 924(a)(2). But the erroneous application of ACCA resulted in a 15-year sentence. *Supra* pp. 5–8; Criminal Dkt. 45 at 6.

Lairy's 15-year sentence exceeded § 922(g)(1)'s 10-year statutory maximum by 5 years. Because Lairy's sentence exceeded "the maximum [sentence] authorized by law," his amended § 2255 motion must be granted. 28 U.S.C. § 2255(a). This Court must then resentence him "using the applicable statutory maximum sentence." *Lomax*, 2021 WL 490271 at *3. No need for an evidentiary hearing exists before this Court agrees with Lairy and grants his amended motion. *See id.* at *3–*4; *Alston*, 2021 WL 82963 at *2–*3.

Last, the government's two procedural arguments in response are meritless. *See* Civil Dkt. 22 at 6–10, 14 (invoking Lairy's plea waiver and arguing that he procedurally defaulted the ACCA claim).

First, the government argues that the § 2255 waiver in Lairy's plea agreement precludes him from bringing the ACCA claim mentioned above. *See id.* at 6–7, 14. But that waiver may not be enforced if enforcing it would result in a miscarriage of justice. *United States v. Litos*, 847 F.3d 906, 910–11 (7th Cir. 2017). And enforcing the erroneous application of ACCA here would result in a miscarriage of justice. *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019) ("[A] defendant sentenced in error as an armed career criminal satisfies the miscarriage of justice requirement.") (cleaned up); *Light v. Caraway*, 761 F.3d 809, 813 (7th Cir. 2014); *Lomax*, 2021 WL 490271 at *3. So, Lairy's plea waiver may not be enforced here. *E.g.*, *Chazen*, 938 F.3d at 856; *Light*, 761 F.3d at 813.

Second, the government argues that Lairy procedurally defaulted his ACCA argument because he failed to raise it in his criminal case. *See* Civil Dkt. 22 at 7–10, 14. But Lairy easily "overcome[s] procedural default by showing . . . that failure to consider the [procedurally] defaulted claim will result in a fundamental miscarriage of justice." *Cross v. United States*, 892 F.3d 288, 294–95 (7th Cir. 2018). And as explained above, failing to fix the erroneous application of ACCA in Lairy's case would constitute a fundamental miscarriage of justice. *See Chazen*, 938 F.3d at 856; *Light*, 761 F.3d at 813; *Lomax*, 2021 WL 490271 at *3. Procedural default cannot bar Lairy's ACCA claim.[3]

[3] The Seventh Circuit has deemed sentencing errors much less severe (than the sentencing error in Lairy's case) a fundamental miscarriage of justice. *E.g.*, *Narvaez v. United States*, 674 F.3d 621, 628–30 (7th Cir. 2011) (deeming a Guidelines error a fundamental miscarriage of justice).

C. Lairy's claim regarding ineffective assistance of counsel requires resentencing.

A two-part test governs Lairy's ineffective-assistance-of-counsel claim under the Sixth Amendment. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Brock-Miller v. United States*, 887 F.3d 298, 308 (7th Cir. 2018). First, Larry must show that trial counsel performed deficiently. *Brock-Miller*, 887 F.3d at 308. Second, Lairy must show that trial counsel's deficient performance prejudiced him. *Id.*

Lairy satisfies both parts.

1. Trial counsel performed deficiently in Lairy's criminal case.

To show a deficient performance, Lairy must show that trial counsel's performance fell below an objective standard of reasonableness. *Frye*, 566 U.S. at 140, 149; *Brock-Miller*, 887 F.3d at 308.

The Seventh Circuit has applied that deficient-performance test in categorical-approach cases. *E.g.*, *Harris v. United States*, 13 F.4th 623, 629–30 (7th Cir. 2021); *Bridges v. United States*, 991 F.3d 793, 803–08 (7th Cir. 2021); *Brock-Miller*, 887 F.3d at 308–13. "[C]ompetent counsel need[s] to understand [the categorical approach] and be able to use it" because it regularly arises in criminal cases. *Bridges*, 991 F.3d at 805. The categorical approach requires comparing statutory definitions. *See Harris*, 13 F.4th at 630. The Seventh Circuit "has stated repeatedly that comparing statutory definitions is part of competent representation." *Id.*; *accord Bridges*, 991 F.3d at 805; *Brock-Miller*, 887 F.3d at 311 ("Reading statutes and discerning their plain meaning is neither convoluted nor sophisticated; it is what lawyers must do for their clients every day.").

In the ineffective-assistance-of-counsel context, the Seventh Circuit recently addressed the Indiana-cocaine argument presented in Lairy's case. *Harris*, 13 F.4th at 629. It explained that the defendant's trial counsel should have known about the Indiana-cocaine argument. *See id.* And it explained that the Indiana-cocaine argument is "not complex" because counsel "only had to compare the plain language of statutes." *Id.* at 630. A competent attorney would raise the Indiana-cocaine argument—unless a strategic reason exists not to raise that argument. *See id.*; *Henderson*, Dkt. 21 at 5–6; *Pierson v. United States*, no. 1:21-cv-01264-JMS-MG, Dkt. 18 at 10.[4]

Lairy's trial counsel should have known about Lairy's winning Indiana-cocaine argument. *Harris*, 13 F.4th at 629; *Pierson*, Dkt. 18 at 10. But Lairy's trial counsel missed that winning argument, which would have drastically decreased Lairy's sentence. *See* Criminal Dkt. 25 at 1–2, 12–14; Criminal Dkt. 45 at 6. Trial counsel instead advised Lairy to accept the government's mistaken plea agreement (which relied on ACCA). *See* Criminal Dkt. 25 at 1–2, 12, 14. Lairy's trial counsel performed deficiently unless he had a strategic reason not to raise the winning Indiana-cocaine argument. *Harris*, 13 F.4th at 630; *Henderson*, Dkt. 21 at 5–6; *Pierson*, Dkt. 18 at 10.

Lairy's trial counsel lacked any strategic reason. Lairy had everything to gain in raising the Indiana-cocaine argument and knocking out the ACCA

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[4] There was an obvious strategic reason to accept the government's mistaken plea agreement in *Harris*. The defendant in *Harris* risked a possible life-imprisonment sentence if he did not accept the government's mistaken plea agreement and the district court rejected the winning Indiana-cocaine argument. *Harris*, 13 F.4th at 631. Nothing close to that situation existed in Lairy's case.

enhancement. Indeed, ACCA dramatically increased Lairy's Guidelines range from 51–63 months to 180–210 months and mandated at least a 180-month sentence. But Lairy did not risk much of anything if he raised the winning Indiana-cocaine argument and somehow lost. Lairy did not avoid a worse recidivist enhancement in accepting the government's erroneous plea agreement. *E.g.*, *Liggins v. United States*, No. 2:19-CV-02129-SLD, 2022 WL 4537865, at *9 (C.D. Ill. Sept. 28, 2022); *Pierson*, Dkt. 18 at 10.

With everything to gain and nothing to lose in raising the Indiana-cocaine argument, Lairy's trial counsel lacked a strategic reason when failing to raise that winning argument. *Harris*, 13 F.4th at 630; *Bridges*, 991 F.3d at 808; *Henderson*, Dkt. 21 at 5–6; *Pierson*, Dkt. 18 at 10. He performed deficiently in advising Lairy to accept the plea agreement and then failing to object to the ACCA enhancement during Lairy's sentencing. *E.g.*, *Bridges*, 991 F.3d at 808; *Henderson*, Dkt. 21 at 5–6; *Pierson*, Dkt. 18 at 10.

2. Trial counsel's deficient performance prejudiced Lairy.

To show prejudice here, a "reasonable probability" must exist that "the [final] result of [Lairy's] criminal process would have been . . . a sentence of less prison time." *See Frye*, 566 U.S. at 147. Guidelines calculation errors satisfy the reasonable-probability standard. *E.g.*, *Harris*, 13 F.4th at 629; *see also Molina-Martinez v. United States*, 578 U.S. 194, 199–201 (2016) (explaining that *any* Guidelines calculation error in the ordinary case results in prejudice because the Guidelines are the lynchpin for a person's sentence).

"Prejudice" is more than reasonably probable here. Lairy would *necessarily* have received a sentence shorter

than his 15-year sentence absent trial counsel's deficient performance. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(2). That is because the statutory maximum sentence would have been only 10 years' imprisonment absent the deficient performance. *Id.* Further, Lairy's Guidelines range would have been only 51–63 months of imprisonment instead of 180–210 months. Criminal Dkt. 30 at 5, 15; U.S.S.G. Chapter 5, Pt. A (sentencing table). That Guidelines error also suffices for prejudice here. *Molina-Martinez*, 578 U.S. at 194, 199–201; *see also Harris*, 13 F.4th at 629.

3. The government's two procedural arguments are also meritless in the ineffective-assistance context.

Lairy explained above why the government's two procedural arguments fail. *Supra* pp. 11–12. In the ineffective-assistance context, those procedural arguments fail for additional reasons.

First, as previously mentioned, the government invoked Lairy's § 2255 waiver in his plea agreement. *See* Civil Dkt. 22 at 6–7, 14. But that waiver does not encompass a claim regarding ineffective assistance of counsel. Criminal Dkt. 25 at 11 ("As concerns the Section 2255 waiver, the waiver does not encompass claims . . . that the defendant received ineffective assistance of counsel."). The government's plea-waiver argument fails.

Second, the government argued that Lairy procedurally defaulted his ACCA claim because he failed to raise it in his criminal case. Civil Dkt. 22 at 7–10, 14. But ineffective-assistance-of-counsel claims are not subject to procedural default when first raised in a § 2255 motion. *Massaro v. United States*, 538 U.S. 500, 504 (2003) ("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim

on direct appeal."). The government's procedural-default argument also fails.

* * *

In the end, trial counsel's deficient performance prejudiced Lairy when he failed to raise a game-changing argument without a strategic reason. If this Court reaches Lairy's ineffective-assistance claim, it should be granted on that ground without a hearing. *E.g.*, *Pierson*, Dkt. 18 at 10. But at a bare minimum, Lairy would be entitled to a hearing on that claim. *E.g.*, *Liggins*, 2022 WL 4537865 at *9. That is because the amended motion and the record do not "conclusively show" that Lairy "is entitled to no relief." 28 U.S.C. § 2255(b).

Conclusion

For the reasons above, this Court must grant Michael Lairy's amended § 2255 motion. This Court should promptly grant that motion without holding an evidentiary hearing. *Lomax*, 2021 WL 490271 at *3–*4; *Alston*, 2021 WL 82963 at *2–*3. It should then resentence him "using the applicable statutory maximum sentence." *Lomax*, 2021 WL 490271 at *3. Alternatively, this Court should hold an evidentiary hearing. *See, e.g.*, *Liggins*, 2022 WL 4537865 at *9. If somehow this Court denies Lairy's amended § 2255 motion (it shouldn't), Lairy requests a certificate of appealability.

Respectfully submitted,

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Certificate of Service

I certify that on January 19, 2023, a copy of the motion above was filed electronically. Notice of the filing will be sent to the parties of record via this Court's electronic-filing system. Parties may access this filing via the Court's system.

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