**No.** _____

In the

# Supreme Court of the United States

MAGDALENO MEDINA, JR.,
ALSO KNOWN AS MAGDALENO MEDINA,
*PETITIONER*,

v.

UNITED STATES OF AMERICA,
*RESPONDENT*,

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

J. MATTHEW WRIGHT
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# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
**FILED**
January 24, 2020
Lyle W. Cayce
Clerk

No. 17-11176

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MAGDALENO MEDINA, JR., also known as Magdaleno Medina,

Defendant-Appellant

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 6:16-CV-26

Before HAYNES and OLDHAM, Circuit Judges, and HANEN,* District Judge

PER CURIAM:**

Appellant, Magdaleno Medina, Jr., was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The indictment also alleged a sentencing enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). Medina pleaded guilty pursuant to a plea agreement requesting a sentence of 195 months. Accompanying the plea

* District Judge of the Southern District of Texas sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

agreement was a signed factual resume. In it, Medina admitted that he had been convicted of three prior felonies, all in Texas: (1) a 1996 conviction for aggravated assault with a deadly weapon; (2) a 2005 conviction for aggravated assault with a deadly weapon; and (3) a 2005 conviction for possession of cocaine with the intent to distribute. Medina further admitted that "each of [his prior] convictions qualifie[d] as either a 'violent felony' or 'serious drug offense, and he [was], therefore, subject to the enhanced penalty provision in the [ACCA]."'[1] Consistent with the plea agreement and factual resume, the sentencing court found that Medina's three prior Texas felony convictions satisfied the prerequisites for an enhanced sentence under the ACCA. The court then sentenced Medina to the statutory minimum of 180 months of imprisonment.

Medina challenged his conviction and sentence on appeal, but the appeal was dismissed for want of prosecution. Medina later filed a collateral attack on his conviction under 28 U.S.C. § 2255. That case was dismissed with prejudice by the district court in 2012. Medina never appealed that dismissal.

Three years later, the Supreme Court struck down the residual clause of the ACCA's violent felony definition as unconstitutionally vague under the Due Process Clause. *Johnson v. United States*, 135 S. Ct. 2551 (2015). A year later, the Supreme Court made *Johnson*'s ruling retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016). Following these Supreme Court rulings, Medina filed a second § 2255 motion arguing the application of the ACCA sentencing enhancement to his felon in possession of a firearm conviction violated his right to due process because the sentencing

[1] While a conviction under 18 U.S.C. 924(a)(2) typically carries a maximum sentence of ten years, the ACCA imposes a fifteen-year minimum sentence on defendants who have at least three prior convictions for "violent felonies" or "serious drug offenses." *See* 18 U.S.C. § 924(e)(1).

court allegedly relied on the unconstitutionally vague residual clause in classifying his aggravated assault convictions as violent felonies. The district court transferred his motion to this Court to consider whether to grant the required authorization to file a second § 2255 motion. This Court granted that authorization and returned the case for further consideration.

Following briefing by both sides, the district court denied Medina's motion, finding that (1) his prior aggravated assault convictions both fall under the "use of force" clause of § 924(e)(2)(B)(i); (2) nothing in the record indicates that any of the convictions were ever considered using the ACCA's residual clause; and (3) Medina's motion is time-barred. Medina appealed.

## STANDARD OF REVIEW

"In challenges to district court decisions under 28 U.S.C. § 2255, we measure findings of fact against the clearly erroneous standard and questions of law *de novo*." *United States v. Faubion*, 19 F.3d 226, 228 (5th Cir. 1994). "If the district court did not have jurisdiction to reach the merits, naturally, we cannot reach the merits on appeal." *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1328 (2019).

## DISCUSSION

To receive a sentencing enhancement under the ACCA, a defendant must have been convicted of any combination of at least three "violent felonies" or "serious drug offenses" that occurred on different occasions from one another. 18 U.S.C. § 924(e). The ACCA defines "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" ("the elements clause"); (2) "is burglary, arson, or extortion, [or] involves [the] use of explosives" ("the enumerated offenses clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" ("the residual clause"). *Id.* § 924(e)(2)(B). In *Johnson*, the

Supreme Court struck down the residual clause as unconstitutionally vague; consequently, convictions that only fall under it could not serve to support an ACCA enhancement.

This is Medina's second time filing a habeas petition. A prisoner filing "[a] second or successive habeas application must meet strict procedural requirements before a district court can properly meet the merits of the application." *Wiese*, 896 F.3d at 723 (citing 28 U.S.C. §§ 2244(b) & 2255(h)). "There are two requirements, or 'gates,' which a prisoner making a second or successive habeas motion must pass to have it heard on the merits." *Id.* The prisoner first must seek and receive this Court's permission to file a second or successive motion by "mak[ing] a 'prima facie showing' that the motion relies on a new claim resulting from either (1) 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,' or (2) newly discovered, clear and convincing evidence that but for the error no reasonable fact finder would have found the defendant guilty." *Id.* (quoting 28 U.S.C. §§ 2244(b) & 2255(h)).

If, as here, the Court grants that permission, "the prisoner must [next] actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence." *Id.* (citing §§ 2244(b)(2), (4)). To prove that a successive petition relies on the rule established in *Johnson*, a prisoner "must show that it was more likely than not that he was sentenced under the residual clause." *United States v. Clay*, 921 F.3d 550, 559 (5th Cir. 2019), *as revised* (Apr. 25, 2019); *see also Wiese*, 896 F.3d at 724. In considering whether that showing has been made, the Court "must look to the law at the time of sentencing," and may consider "(1) the sentencing record for direct evidence of a sentence . . . and (2) the relevant background legal environment that existed at the time of the defendant's sentencing and the presentence report and other relevant materials before the

district court." *Wiese*, 896 F.3d at 724 & 725.[2] "Where a prisoner fails to make the requisite showing before the district court, the district court lacks jurisdiction and must dismiss his successive petition without reaching the merits."[3] *Clay*, 921 F.3d at 554.

Medina's petition argues his sentence was improperly imposed under the residual clause and, because it was illegal, this Court should allow this successive § 2255 petition and reverse the original sentence. Medina, however, has not met his burden of showing that it was more likely than not that the sentencing judge relied on the residual clause. As an initial matter, it is beyond question that his conviction for possession of cocaine with the intent to distribute is a "serious drug offense," both now and at the time of conviction. *See United States v. Cain*, 877 F.3d 562 (5th Cir. 2017). Indeed, Medina does not challenge that finding on appeal. *See* Appellant's Br. at 1–2. Therefore, the remaining question is whether it is more likely than not that the sentencing court relied on the residual clause in finding Medina's two convictions for aggravated assault with a deadly weapon were "violent felonies." We find it is not.

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[2] Medina contends that this Court's decision in *Wiese* contradicted our prior published decision in *United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017). More specifically, he contends that while *Taylor* held that a petitioner did not have to prove "what may or may not have crossed a judge's mind during sentencing," 873 F.3d at 482, *Wiese* requires the opposite as it sets out the means for determining "potential reliance on the residual clause by the sentencing court" and places that burden on the petitioner. 896 F.3d at 725. Medina's argument, however, is misplaced. Both cases analyzed other circuit's relevant precedents in this area, and both determined the result would be the same applying any of those standards. The difference was that in *Taylor*, at the time of sentencing, an ACCA enhancement based upon a Texas conviction for injury to a child "could have only applied under the residual clause." 873 F.3d at 482. In *Wiese*, by contrast, a Texas burglary of a habitation conviction could have qualified under the enumerated offenses clause such that Wiese failed to demonstrate that the sentencing judge "may have" relied upon the residual clause. 896 F.3d at 725.

[3] Medina argues that a district court's gatekeeping function under § 2255(h) is "a waivable or forfeitable claims processing rule" and not truly jurisdictional. Appellant's Br. at 34. That argument is foreclosed by this Court's decision in *Clay*.

To begin, Medina has not presented any tangible evidence suggesting the sentencing court relied on the residual clause. Accompanying Medina's plea agreement is a signed factual resume. In it, Medina "admits that each of [his Texas Aggravated Assault with a Deadly Weapon] convictions qualif[y] as … a 'violent felony' . . . and he is, therefore, subject to the enhanced penalty provision in 18 U.S.C. § 924(e)." The factual resume does not specify under which clause they qualify. Additionally, the plea agreement itself has an agreed upon recommendation of 195 months. Thus, this agreement clearly anticipates the application of the ACCA. The Presentence Investigation Report cites and affirms the factual resume stating that "[p]ursuant to his Factual Resume, Medina admitted that each of [his prior] convictions qualified as a 'violent felony' or 'serious drug offense' and he is, therefore, subject to the enhanced penalty provision in 18 USC § 924(e)." It does not specify or suggest the use of the residual clause. No transcript of the sentencing hearing has been produced in the record. In a recent case where a prisoner similarly failed to put forward any evidence suggesting explicit reliance on the residual clause, this Court held that the "more likely than not" standard was not satisfied. *Clay*, 921 F.3d 550. Consistent with that decision, we find Medina has not met his burden.

Medina's only remaining argument is that "at the time of sentencing, [his] offense could not satisfy ACCA's elements clause," and therefore the sentencing court must have relied on the residual clause. Appellant's Br. at 14. This argument also falls short. The indictments corresponding to his previous aggravated assault convictions charged violations of Texas Penal Code § 22.02(a)(2). In pleading guilty to the counts in these indictments, Medina acknowledged that he "commit[ted] assault as defined in Section 22.01 and . . . use[d] or exhibit[ed] a deadly weapon during the commission of the

assault." At the time of the offense, assault as defined in Texas Penal Code § 22.01 applied where a person:

> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contract with another when the person knows or should reasonably believe the other will regard the contact as offensive or provocative.

In *United States v. Martinez*, 962 F.2d 1161, 1168–69 (5th Cir. 1992), this Court held that a prior (and broader) version of Texas's aggravated assault statute "require[d] proof of the use or threat of physical force," i.e. that it satisfied the elements clause. In *Martinez*, as here, the defendant was convicted for Texas aggravated assault with a deadly weapon. *Id.* Medina argues that, at the time of his sentencing, the law in this circuit would have foreclosed a finding that his offenses required the use of physical force. Appellant's Br. at 14. In support of this proposition, Medina cites to a line of cases discussing the difference between crimes focused on the resultant harm and those requiring the actual use of force by the defendant. *Id.* at 14–15. Under this line of cases, intoxication assault, simple assault, aggravated assault of a peace officer, endangering a child, and injury to a child were all held not to satisfy the elements clause. *See United States v. Vargas-Duran,* 356 F.3d 598, 606 (5th Cir. 2004) (Texas intoxication assault); *United States v. Villegas-Hernandez*, 468 F.3d 874, 882–883 (5th Cir. 2006) (Texas felony assault); *United States v. Fierro-Reyna*, 466 F.3d 324, 326 (5th Cir. 2006) (Texas aggravated assault of a peace officer); *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc) (Texas endangering a child); *United*

*States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (Texas injury to a child).[4] Further, Medina cites to cases which hold that the defendant must intentionally avail himself of the use of force. Appellant's Br. at 15–16.

These cases suggest, at most, that the legal landscape surrounding the elements clause's applicability to aggravated assault convictions in Texas required case-specific analysis. Despite this line of cases, Appellant has not cited, and the Court cannot find, any case upsetting the core holding of *Martinez*—that aggravated assault with a deadly weapon was a "violent felony" under the elements clause. To the contrary, mere months after Medina's sentencing, this Court, citing its decision in *Martinez*, affirmed an ACCA sentencing enhancement premised on a Texas aggravated assault conviction. *See United States v. Sneed*, 329 F. App'x 563 (5th Cir. 2009). As such, the law surrounding Texas aggravated assault with a deadly weapon was settled at the time of Medina's sentencing—albeit not in his favor.

Even assuming Medina could convince this Court that there was uncertainty surrounding the offense, his ultimate claim would not fare any better as he still lacks the requisite proof. In a recent case, this Court held that uncertainty in the legal landscape at the time of conviction "[a]t most . . . shows that the sentencing court *might have* relied on the residual clause." *United States v. Hernandez*, 779 F. App'x 195, 199 (5th Cir. 2019) (emphasis added); *see also Taylor*, 873 F.3d at 482 (finding prisoner met the "more likely than not" standard where circuit precedent prior to conviction had settled that the predicate offense could have applied only under the residual clause).

[4] The Court notes that four of these cases—*Vargas-Duran*, *Villegas-Hernandez*, *Calderon-Pena*, and *Gracia-Cantu*—were recently overruled in whole or in part by this Court's decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc). The Court cites to these cases only to examine the legal landscape at the time of Medina's sentencing.

Considering the lack of evidence and the legal landscape surrounding Texas aggravated assault, Medina has failed to meet his burden of showing that the sentencing court more likely than not relied on the residual clause. Therefore, he has failed to satisfy the jurisdictional requirements for a successive petition under § 2255. Thus, this Court does not have jurisdiction to reach the merits of his claim and the district court was correct in dismissing this petition.

## CONCLUSION

For the foregoing reasons, the ruling of the district court is AFFIRMED.

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 17-11176

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MAGDALENO MEDINA, JR., also known as Magdaleno Medina,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Magdaleno Medina, Jr., federal prisoner # 37861-177, was convicted of possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 180 months of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), based on his Texas convictions for possession of cocaine with intent to deliver and aggravated assault with a deadly weapon. This court granted Medina authorization to file a successive 28 U.S.C. § 2255 motion raising a claim that his Texas convictions do not qualify as predicate offenses under the ACCA in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of § 924(e)(2)(B)(ii), was unconstitutionally vague. Medina conceded that his drug offense qualified as a serious drug offense but argued that his aggravated assault convictions were no longer violent felonies after

*Johnson*. The district court concluded that Medina's prior convictions for aggravated assault fell under the "use of force" clause of § 924(e)(2)(B)(i), and sua sponte determined that, because Medina's sentence under the ACCA was unaffected by *Johnson*, Medina's § 2255 motion was untimely. Thus, the district court's denial of § 2255 relief was based alternatively on substantive and procedural grounds.

Medina, represented by the Federal Public Defender, now moves for a certificate of appealability (COA) to appeal the district court's denial of his § 2255 motion. To obtain a COA, Medina must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When the district court has rejected the constitutional claims on the merits, "[t]he [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. When the district court has denied relief based on procedural grounds, a COA should be granted "when the prisoner shows, at least, that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. The decision whether to grant a COA is made "without full consideration of the factual or legal bases adduced in support of the claims" and without deciding the merits of the appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Because Medina has made the required showing, a COA is GRANTED on the following issues: (1) whether the district court erred by dismissing Medina's motion as untimely; and (2) whether Medina is entitled to relief on his claim that, after *Johnson*, he no longer qualifies for sentencing under the

ACCA based on his two prior convictions for Texas aggravated assault. In addressing the timeliness determination, the parties should also address the sua sponte nature of the ruling. The clerk is DIRECTED to establish a briefing schedule, notify the Government that a COA has been granted, and include the Government in the briefing schedule.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

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| MAGDALENO MEDINA, JR., | ) | |
| | ) | |
| Movant, | ) | CIVIL ACTION NO. 6:16-CV-026-C |
| | ) | |
| v. | ) | CRIMINAL NO. 6:08-CR-041-01-C |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER**

On May 23, 2016, Magdaleno Medina, Jr. ("Movant") filed his Motion to Vacate Under 28 U.S.C. § 2255. Because Movant had not received permission to file a second or successive § 2255 motion, the Court transferred his motion to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit authorized Medina's successive § 2255 motion on June 8, 2016, and returned jurisdiction to this Court. Movant, now represented by the Federal Public Defender, filed his Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on June 22, 2016. The United States of America ("Respondent") filed its Response on August 15, 2016. Movant filed his Reply on September 6, 2016.

Medina pleaded guilty to being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On May 8, 2009, he was sentenced under the Armed Career Criminal Act of 1984 (ACCA) to a 180-month term of imprisonment. 18 U.S.C. § 924(e). Medina appealed his conviction, but the Fifth Circuit dismissed the appeal for want of prosecution. Movant previously filed a Motion Under 28 U.S.C. § 2255 on September 20, 2010, which was denied and dismissed with prejudice on October 10, 2012. *Medina v. United States*, No. 6:10-CV-088-C (N.D. Tex. 2012) (Cummings, J.) This is his second § 2255 motion.

Medina pleads that he is entitled to relief under the Supreme Court's decision in *Johnson v. United States*, which held that the "residual clause" of the ACCA is unconstitutionally vague. 135 S. Ct. 2551 (2015); 18 U.S.C. § 924(e)(2)(B)(ii). Specifically, he argues that at least one of his prior convictions for aggravated assault with a deadly weapon and possession of a controlled substance with intent to deliver no longer qualify as violent felonies or serious drug offenses. In *Welch v. United States*, 136 S.Ct. 1257 (2016), the Supreme Court held that its decision in *Johnson* announced a new substantive rule of constitutional law that applies retroactively in a collateral challenge to an ACCA residual clause sentence. Medina was sentenced under the ACCA. But the Court is of the opinion that Medina has failed to show that he was sentenced under the residual clause of the ACCA. To the contrary, the Court is persuaded by the United States' arguments that Medina's prior drug conviction qualifies as a serious drug offense and that Medina's prior assault convictions both fall under the "use of force" clause of § 924(e)(2)(B)(i); there is nothing in the record indicating that any of these convictions were ever considered under the statute's residual clause. *See* Resp. 3–8; *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); Tex. Penal Code Ann. § 22.02(a)(2) (1995 and 2000 versions). Medina therefore continues to qualify for an enhanced ACCA sentence even following the Supreme Court's holding concerning the residual clause in *Johnson*.

The Court is of the opinion that—because Johnson does not directly apply—Medina's motion is otherwise time-barred because it was filed more than one year after the Court's judgment became final. 28 U.S.C. § 2255(f)(1). As for any argument seeking relief under *Mathis v. United States*, 136 S. Ct. 2243 (2016), or *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the Court notes that those holdings have not been made retroactive on collateral

review by the Supreme Court and therefore do not provide any basis to raise a collateral attack on Medina's conviction. *See United States v. Morgan*, 845 F.3d 664, 666–68 (5th Cir. 2017); *In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016) (per curiam).

The Court has carefully considered Medina's motion, the United States' response, Medina's reply, and the relevant records, and is of the opinion that Medina's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody should be **DENIED** and **DISMISSED with prejudice** for each of the reasons stated herein as well as those argued in the United States' thorough and well-drafted response.

All relief not expressly granted is **DENIED**, and any pending motions are **DENIED**.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. For the reasons set forth herein, Movant has failed to show that a reasonable jurist would find (1) this Court's "assessment of the constitutional claims debatable or wrong" or (2) "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).

SO ORDERED.

Dated this 9th day of August, 2017.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

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| MAGDALENO MEDINA, JR., | ) | |
| | ) | |
| Movant, | ) | CIVIL ACTION NO. 6:16-CV-026-C |
| | ) | |
| v. | ) | CRIMINAL NO. 6:08-CR-041-01-C |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

**JUDGMENT**

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is **DENIED** and **DISMISSED with prejudice**.

Dated August 9, 2017.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

17-11176.97

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 16-10305

In re: MAGDALENO MEDINA, JR.,

Movant


**A True Copy**
**Certified order issued May 03, 2016**

Tyle W. Cayce
**Clerk, U.S. Court of Appeals, Fifth Circuit**

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, San Angelo to consider
a successive 28 U.S.C. § 2255 motion

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Magdaleno Medina, Jr., federal prisoner # 37861-177, moves for authorization to file a successive 28 U.S.C. § 2255 motion to challenge his 180-month sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA). He argues that he was erroneously sentenced as an armed career criminal in light of the United States Supreme Court's recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which he contends is a new rule of constitutional law applicable to cases on collateral review. Medina seeks to challenge his sentence on the ground that his predicate conviction for aggravated assault under Texas Penal Code §§ 22.01 and 22.02 is not a violent felony under the ACCA. Medina also has filed a motion to vacate the district court's judgment, which we construe as a motion to supplement the motion for authorization, a motion to stay the proceedings pending a decision by the United States Supreme Court in *Welch v. United States*, 136 S. Ct. 790 (2016),

and a motion for release on bail pending the resolution of his successive § 2255 motion.

To obtain authorization, Medina must make a prima facie showing that his claim relies on either (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 [him] 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." § 2255(h); *see* 28 U.S.C. § 2244(b)(3)(C); *see also Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001) (incorporating the prima facie requirement into § 2255).

During the pendency of Medina's motion, the United States Supreme Court decided that *Johnson* announced a new substantive rule of constitutional law that is retroactively applicable to cases on collateral review. *Welch v. United States*, ___ U.S. ___, No. 15-6418, 2016 WL 1551144, 7-12 (April 18, 2016). Accordingly, Medina has made the showing required to obtain authorization to file a successive § 2255 motion.

IT IS ORDERED that Medina's motion for authorization to file a successive § 2255 motion is GRANTED. Under the circumstances, Medina's motion for a stay is DENIED as moot. All other pending motions are DENIED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

| | |
|---|---|
| MAGDALENO MEDINA, JR.,<br>Petitioner,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br>Respondent. | No. 6:16-CV-026-C<br>(6:08-CR-041-C) |

**RESPONSE TO MOTION UNDER 28 U.S.C. § 2255**

Magdaleno Medina's motion poses one question to this Court: Does shooting someone with a firearm qualify as a "violent felony" under the Armed Career Criminal Act (ACCA)? Fortunately, the intuitive answer and the legal answer align in this instance—it does.

**STATEMENT OF THE CASE**

Magdaleno Medina, Jr., pleaded guilty to being a convicted felon in possession of a firearm with the armed career criminal enhancement. (CR Nos. 16-18.)[1] The presentence report (PSR) recommended application of the armed career criminal enhancement under USSG § 4B1.4 because Medina had two prior convictions for aggravated assault with a deadly weapon and one prior conviction for possession of, with intent to deliver, a controlled substance, to-wit: Cocaine, in an

[1] "CR No. __" refers to the docket of the underlying criminal proceeding, *United States v. Magdaleno Medina, Jr.*, No. 6:08-CR-041-C. "CV No. __" refers to the docket of this Section 2255 action.

amount by aggregate weight, of one gram or more, but less than four grams. (PSR ¶¶ 23, 32, 33, 34.) Medina did not object to the PSR. (PSR Addendum at 1.)

At sentencing, the Court adopted the PSR without objection from Medina and sentenced him to 180 months imprisonment and a five-year term of supervised release. (CR Nos. 23-24.) Ten days later, Medina filed a notice of appeal. (CR No. 25.) On June 25, 2009, the United States Court of Appeals for the Fifth Circuit dismissed Medina's appeal for want of prosecution. (CR No. 28.)

On September 20, 2010, Medina filed his first motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (CR No. 29.) On October 10, 2012, the Court denied Medina's motion and dismissed his claims with prejudice. (CV No. 8.)

On May 23, 2016, Medina filed a successive motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (CR No. 33.) On May 3, 2016, the United States Court of Appeals for the Fifth Circuit authorized Medina's successive motion. (CV No. 5.) On June 23, 2016, the Court directed the Government to respond to Medina's successive section 2255 motion. (CV No. 9.)

## STATEMENT OF THE ISSUE

Medina advances one straightforward argument: At least one of Medina's three predicate offenses under the ACCA was invalidated by the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and,

therefore, Medina's 180-month sentence exceeds the statutory maximum of 120 months.

## ARGUMENT AND AUTHORITIES

### Standard of Review

Under 28 U.S.C. § 2255, a prisoner may move the convicting court to vacate, set aside, or correct his conviction or sentence. It provides four grounds: "(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is 'otherwise subject to collateral attack.'" *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996) (citation omitted). Medina is proceeding under the third ground.

### Discussion

In order to adjudicate Medina's claim, this Court must answer two questions. First, does Medina's prior conviction for possession of, with intent to deliver, a controlled substance, to-wit: Cocaine, in an amount by aggregate weight, of one gram or more, but less than four grams, qualify as a "serious drug offense" under the ACCA? Second, do each of Medina's two prior convictions for aggravated assault with a deadly weapon qualify as a "violent felony" under the ACCA? Each will be addressed in turn.

Medina's conviction for possession of cocaine with intent to deliver qualifies as a "serious drug offense" under the ACCA. The ACCA defines a serious drug offense as "an offense under State law, involving manufacturing, distributing, or

possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." Here, Medina was convicted of possession of, with intent to deliver, a controlled substance, to-wit: Cocaine, in an amount by aggregate weight, of one gram or more, but less than four grams. This offense is a second-degree felony that carries a maximum term of imprisonment of twenty years. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(c); TEX. PENAL CODE ANN. § 12.33(a). Accordingly, this conviction qualifies as a "serious drug offense" under the ACCA. *See United States v. Herrold*, 813 F.3d 595, 599-600 (5th Cir. 2016); *United States v. Fearance*, 582 Fed. Appx. 416 (5th Cir. 2014) (per curiam) (unpublished decision); *Waller v. United States*, 2016 WL 1165992, at *2 (N.D. Tex. Feb. 22, 2016).

Next, the Government turns to Medina's argument that his convictions for aggravated assault with a deadly weapon do not qualify as violent felonies under the ACCA. Relevant here, the term "violent felony" means: "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another." The 1995 and 2002 versions of Section 22.02(a)(2) of the Texas Penal Code define aggravated assault with a deadly weapon as: "[a] person commits an offense if the person commits assault as defined in § 22.01[2] and the person: (1) causes serious

[2] Section 22.01(a) provided that "[a] person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or (3)

bodily injury to another . . . or (2) uses or exhibits a deadly weapon during the commission of the assault."

Where a statute "sets out one or more elements of the offense in the alternative," *Descamps v. United States,* 133 S. Ct. 2276, 2281 (2013), a "modified categorical approach" is applied, which permits Court to look to certain documents to determine which statutory alternative was implicated by the offense of conviction. The indictment and judicial confession narrow Medina's convictions to violations of sections 22.01(a)(1) (causing bodily injury to another) and 22.02(a)(2) (use and exhibition of a weapon). Specifically, in case number B-95-0605-S, Medina pleaded guilty to count one of the indictment, which alleged that: "Magdaleno Medina, Defendant . . . did then and there intentionally and knowingly use a deadly weapon, to wit: a firearm, and did then and there intentionally and knowingly cause bodily injury to Alex Deleon, by shooting the said Alex Deleon with the said deadly weapon." *See* Government's Exhibit 1. Likewise, in case number A-04-0537-S, Medina pleaded guilty to count one of the indictment, which alleged that: "Magdaleno Medina, Defendant . . . did then and there intentionally, knowingly, and recklessly cause bodily injury to Kenneth Key by shooting the said Kenneth Key in the leg, and the defendant did then and there use and exhibit a deadly weapon, to-wit: a firearm, which in the manner of its use and intended use was capable of

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intentionally or knowingly causes physical contact with another when the person knows or should reasonable believe that the other will regard the contact as offensive or provocative."

causing death or serious bodily injury during the commission of said assault." *See* Government's Exhibit 2.

The *Shepard* documents prove that Medina's offense necessarily had as an element the use of force against the person of another. That is, to convict him, the prosecution had to prove that Guzman actually used or exhibited—i.e, more than just possessed—a firearm while committing an assault in which he caused bodily injury. It is this element that places his offense in the category of cases in which this Court has found that "use of force" was an element. Specifically, in *United States v. Velasco*, the Court found that, after narrowing the statute to the actual offense of conviction, "the statute require[d] the actual 'use' of the weapon to commit the [battery]." *United States v. Velasco*, 465 F.3d 633, 640 (5th Cir. 2006). In so holding, the Court said "[i]n order to 'use' a weapon to cause bodily harm, one must, at the very least, threaten the use of physical force." *Velasco*, 465 F.3d at 640; *see also United States v. Guzman*, 797 F.3d 346, 348 (5th Cir. 2015) (per curiam) (holding that district court did not clearly err in holding that aggravated assault under section 22.02(a)(2) was a "violent felony" for ACCA purposes). Similarly, in *United States v. Dominguez*, the Court held that "the touching of an individual with a deadly weapon creates a sufficient threat of force" that the threatened force is an element of the crime. *United States v. Dominguez*, 479 F.3d 345, 348 (5th Cir. 2007).

It is true that this Court has held that a simple Texas assault does not have as an element the actual, attempted, or threatened use of force. *See United States v.*

*Villegas-Hernandez*, 468 F.3d 874, 882 (5th Cir. 2006); *see also Gomez-Perez v. Lynch*, No. 14-60808, 2016 WL 3709757, at *3 (5th Cir. July 11, 2016) (holding that Texas simple assault statute does not allow application of the modified categorical approach). It is likewise true that this Court has found the same for the Texas aggravated assault statute, where the conviction documents do not allow the Court to narrow the offense. *See United States v. Cortez-Rocha*, 552 Fed. Appx. 322, 326 (5th Cir. 2014) (unpublished decision). But this Court has *not* found the same where the statute *can* be narrowed, and the conviction documents clearly demonstrate that the assault was aggravated because the defendant used and exhibited a deadly weapon. *See United States v. Garcia*, 493 Fed. Appx. 576, 578 (5th Cir. 2012) (holding that there was no support for the defendant's contention that the term "use" includes the mere inert presence of a weapon and declining to decide whether his aggravated assault conviction has as an element the use, attempted use, or threatened use of force against the person of another under plain error review). Accordingly, Medina's convictions have as an element the use, attempted use, or threatened use of physical force against the person of another and, therefore, qualify as "violent felonies" under the ACCA.

## CONCLUSION

Because Medina's three prior convictions qualified as either a "serious drug offense" or "violent felony" under the ACCA, this Court should deny his motion.

Respectfully submitted,

JOHN R. PARKER
UNITED STATES ATTORNEY

s/ Jeffrey R. Haag
JEFFREY R. HAAG
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## CERTIFICATE OF SERVICE

I certify that on August 15, 2016, I filed this response with the clerk of court for the U.S. District Court, Northern District of Texas, through the electronic filing system which will also serve counsel for Medina, Brandon Beck.

s/ Jeffrey R. Haag
JEFFREY R. HAAG
Assistant United States Attorney

Government's Exhibit 1

FILED FOR RECORD
'95 OCT 10 AM 9 00
SUE BRAMHALL, DIST. CLERK
TOM GREEN COUNTY TEXAS

TRACK # 38996

NO. B-95-605-S COURT 119th PROSECUTOR Nolen

BOND INFORMATION 50,000

STATE OF TEXAS v. MAGDALENA MEDINA aka MAGDALENO MEDINA

ADDRESS 505 Powell St. DOB 5-1-80 DL#

CHARGE 2 Cts. AGGRAVATED ASSAULT WITH A DEADLY WEAPON

(Sec. 22.02(a)(2)) CJIS# 13150005

**********

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

COUNT ONE

The Grand Jurors for the County of Tom Green, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the April Term, A. D. 1995, of the 119th District Court of said County, upon their oaths present in and to said Court, that DA 2-14-96 ~~MAGDALENA MEDINA aka~~ MAGDALENO MEDINA, Defendant, on or about the 10th day of July, A. D. 1995, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly use a deadly weapon, to-wit: a firearm, and did then and there intentionally and knowingly cause bodily injury to Alex Deleon, by shooting the said Alex Deleon with the said deadly weapon;

COUNT TWO

The Grand Jurors for the County of Tom Green, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the April Term, A. D. 1995, of the 119th District Court of said County, upon their oaths present in and to said Court, that DA 2-14-96 ~~MAGDALENA MEDINA aka~~ MAGDALENO MEDINA, Defendant, on or about the 10th day of July, A. D. 1995, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly use a deadly weapon, to-wit: a firearm, and did then and there intentionally and knowingly cause

17-11176.50

bodily injury to Jason Yruegas, by shooting the said Jason Yruegas with the said deadly weapon;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Foreman of the Grand Jury

No. B-95-0605-S

THE STATE OF TEXAS — IN THE DISTRICT COURT OF

VS — TOM GREEN COUNTY, TEXAS

MAGDALENO MEDINA — 119TH JUDICIAL DISTRICT

JUDGMENT AND SENTENCE; PLEA OF GUILTY
WAIVER OF JURY TRIAL

Judge Presiding: Curt F. Steib — Date of Judgment: February 14, 1996

Attorney for State: Howard Whitworth — Attorney for Defendant: Jimmy Stewart

Offense Convicted of: Aggravated assault with a deadly weapon

Degree: Second — Date Offense Committed: July 10, 1995

Charging Instrument: Indictment — Plea: Guilty to Count One

Terms of Plea Bargain (In Detail): Confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of four (4) years, and restitution. State to abandon Count Two and to proceed with Count One

Plea to Enhancement Paragraph(s): N/A — Findings on Enhancement: N/A

Findings on Use of Deadly Weapon: The Court finds beyond a reasonable doubt that during the commission of the felony offense for which the defendant is found guilty herein, said defendant, MAGDALENO MEDINA, used and exhibited a deadly weapon, to-wit: A firearm.

Date Sentence Imposed: February 14, 1996 — Costs: $124.50

Punishment and Place of Confinement: Four (4) years in the Institutional Division of the Texas Department of Criminal Justice and restitution — Date to Commence: February 14, 1996

Time Credited: From: July 10, 1995 — To: February 14, 1996

Total Amount of Restitution/Reparation: $806.45

17-11176.52

Concurrent Unless Otherwise Specified.

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Defendant advised of appellate rights.
Waiver filed: Yes
Date of Waiver: February 14, 1996

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On this day of February 14, 1996, in the above numbered and entitled cause came into open court MAGDALENO MEDINA, defendant, (hereinafter referred to as defendant) together with Jimmy Stewart, defendant's appointed attorney; and the State appeared by Howard Whitworth, Assistant District Attorney. All provisions of law pertaining service of the indictment, arraignment, time for preparation for trial and reading of the indictment, plea bargaining and any agreements relating thereto having been complied with, defendant waived the right to jury trial as to both the issues of guilt and punishment, the District Attorney consenting and the Court approving. Both parties announced ready for trial. A plea of guilty thereto was entered by the defendant; the defendant was admonished by the Court of the consequences of said plea, including the range of punishment attached to the offense and the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the Court, and said defendant persisted in such plea of guilty. It plainly appearing to the Court that the defendant is sane and in all things mentally competent, that the defendant's plea is free and voluntary, and defendant's plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant.

And the Court having heard all the evidence submitted for the State and the defendant and the argument of counsel is of the opinion and finds that said defendant is guilty of the offense of aggravated assault with a deadly weapon, a felony of the second degree, committed on July 10, 1995, as charged in Count One of the indictment, and that defendant's punishment should be by confinement in the Institutional Division of Texas Department of Criminal Justice for a period of four (4) years.

The Court finds beyond a reasonable doubt that during the commission of the felony offense for which the defendant is found guilty herein, said defendant, MAGDALENO MEDINA, used and exhibited a deadly weapon, to-wit: a firearm.

IT IS, THEREFORE, CONSIDERED AND ADJUDGED by the Court that said defendant is guilty of the offense aforesaid, and that defendant be punished as found by the Court, that is, by confinement in the Institutional Division of Texas Department of Criminal Justice for a term of four (4) years and that the State of Texas do have and recover of said defendant all costs in this prosecution, for which execution may issue.

Thereupon the defendant was asked by the Court whether said defendant had anything to say why sentence should not be pronounced against the defendant, and the defendant answered nothing in bar thereof. Whereupon the Court proceeded in the presence of said defendant and his counsel to pronounce sentence as follows:

IT IS ORDERED by the Court that the defendant be and is hereby sentenced to confinement in the Institutional Division of Texas Department of Criminal Justice for a term of four (4) years and that the State of Texas do have and recover of said defendant all costs of this prosecution for which execution may issue against the property of said defendant, and that the defendant be delivered by the Sheriff of Tom Green County, Texas, or the authorized agent of the State of Texas, to the Director of the Institutional Division of Texas Department of Criminal Justice, or other person legally authorized to receive such convicts, and the said defendant shall be confined in the manner and for which period aforesaid.

The Court finds that the evidence adduced in this case established that by the conduct of the defendant herein the following named person and/or entities are victim(s) of the defendant's crime, and under the Code of Criminal Procedure respective restitution or reparation should be as indicated:

| Name and Address of Victim: | Amount of Restitution |
|---|---|
| Jason C. Yruegas<br>720 Parson<br>San Angelo, Texas 76903 | $75.00 |
| Shannon Hospital<br>#434438<br>P. O. Box 1879<br>San Angelo, Texas 76902 | $634.45 |
| San Angelo Radiologists<br>#62326<br>3308 Foster Street<br>San Angelo, Texas 76904 | $97.00 |
| Total | $806.45 |

The defendant having been confined during the times indicated shall be given credit on his sentence as follows, such dates inclusive:

FROM: July 10, 1995 TO: February 14, 1996

In accordance with the provisions of Art. 42.03, Sec. 4, Texas Code of Criminal Procedure, the Sheriff is directed to attach to the commitment papers a statement showing (i) the time the defendant spent in jail; (ii) the time the defendant was placed in custody as of, or after, the pronouncement of sentence; and (iii) an assessment of the defendant's conduct while in jail and/or in custody.

Said defendant is hereby remanded to jail until the directions of this sentence can be obeyed.

SIGNED on the day and year first above written.

Judge Presiding

NO. B-95-0605-S

THE STATE OF TEXAS

VS.

~~Magdaleno Medina aka~~ Magdaleno Medina

IN THE DISTRICT COURT OF

TOM GREEN COUNTY, TEXAS

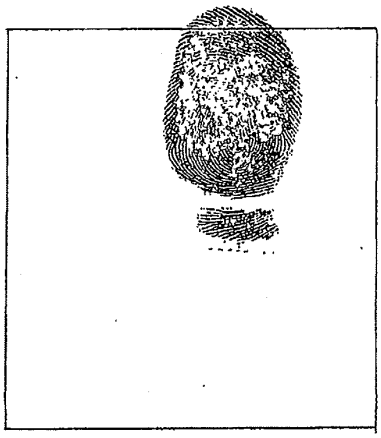
119th JUDICIAL DISTRICT

ATTACHMENT TO JUDGEMENT

DATED Feb 29, 1996

FINGERPRINT OF DEFENDANT

RIGHT THUMB



Deputy
Tom Green County Sheriff's Office

Government's Exhibit 2

NO. A-04-0537-S COURT 51ST PROSECUTOR PALMER

BOND INFORMATION $10,000.-

STATE OF TEXAS v. MAGDALENO MEDINA

ADDRESS _____ DOB 05-01-80 DL# _____

CHARGE AGG ASSAULT WITH A DEADLY WEAPON (Sec. 22.02(a)(2))

CJIS#13150005

**********

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

PARAGRAPH ONE

The Grand Jurors for the County of Tom Green, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the JANUARY Term, A. D. 2004, of the 51ST District Court of said County, upon their oaths present in and to said Court, that MAGDALENO MEDINA, Defendant, on or about the 29TH day of SEPTEMBER, A. D. 2000, and before the presentment of this indictment, in said County and State, did then and there intentionally, knowingly, and recklessly cause bodily injury to KENNETH KEY by shooting the said KENNETH KEY in the leg, and the defendant did then and there use and exhibit a deadly weapon, to-wit: a firearm, which in the manner of its use and intended use was capable of causing death or serious bodily injury, during the commission of said assault.

PARAGRAPH TWO

And, the Grand Jurors upon their oaths further present that prior to the commission of the offense in paragraph one, MAGDALENO MEDINA, on the 14th day of FEBRUARY, 1996, in the 119TH District Court of TOM GREEN County, Texas, in Cause Number B-95-0605-S styled THE STATE OF TEXAS vs. MAGDALENO MEDINA, was legally and finally convicted of AGGRAVATED ASSAULT WITH A DEADLY WEAPON, a felony, upon a charging instrument then pending in that Court and of which that Court had jurisdiction;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

J. Randall Ross

17-11176.58

NO. B-04-0537-S

THE STATE OF TEXAS — IN THE DISTRICT COURT OF

VS — TOM GREEN COUNTY, TEXAS

MAGDALENO MEDINA — 119TH JUDICIAL DISTRICT

JUDGMENT AND SENTENCE; PLEA OF GUILTY
WAIVER OF JURY TRIAL

Judge Presiding: Ben Woodward — Date of Judgment: February 4, 2005

Attorney for State: Stephen Lupton — Attorney for Defendant: Steve Herschberger

Offense Convicted of: Aggravated assault with a deadly weapon

Degree: Second — Date Offense Committed: September 29, 2000

Charging Instrument: Indictment — Plea: Guilty to Paragraph One

Terms of Plea Bargain (In Detail): Confinement in the Institutional Division of the Texas Department of Criminal Justice [hereafter referred to as the Institutional Division (ID)] for a period of five (5) years. State to abandon Paragraph Two and to proceed with Paragraph One of the indictment. Court to take into consideration #B-02-0715-S pending in the 119th District Court of Tom Green County, Texas and #5114 pending in the 119th District Court of Runnels County, Texas pursuant to Section 12.45 of the Texas Penal Code.

Plea to Enhancement Paragraph(s): Abandoned — Findings on Enhancement: N/A

Findings on Use of Deadly Weapon: The Court finds beyond a reasonable doubt that during the commission of the felony offense for which the defendant is found guilty herein, said defendant, MAGDALENO MEDINA, used and exhibited a deadly weapon, to-wit: A FIREARM, which in the manner of its use and intended use was capable of causing death or serious bodily injury.

Date Sentence Imposed: February 4, 2005 — Costs: See Bill of Costs

Punishment and Place of Confinement: Confinement in the Institutional Division for a period of five (5) years. — Date to Commence: February 4, 2005

17-11176.59

Time Credited: From: October 3, 2000 Through: May 18, 2004

Total Amount of
Restitution/Reparation: -0-

Concurrent Unless Otherwise Specified.

Defendant advised of appellate rights.
Waiver filed: Yes
Date of Waiver: February 4, 2005

On this day of February 4, 2005, in the above numbered and entitled cause came into open court MAGDALENO MEDINA, defendant, (hereinafter referred to as defendant) together with Steve Herschberger, defendant's employed attorney; and the State appeared by Stephen Lupton, District Attorney. All provisions of law pertaining service of the indictment, arraignment, time for preparation for trial and reading of the indictment, plea bargaining and any agreements relating thereto having been complied with, defendant waived the right to jury trial as to both the issues of guilt and punishment, the District Attorney consenting and the Court approving. On motion of the State and with permission of the Court, Paragraph Two of the indictment was abandoned and deleted from the indictment. Both parties announced ready for trial. A plea of guilty to Paragraph One of the indictment was entered by the defendant; the defendant was admonished by the Court of the consequences of said plea, including the range of punishment attached to the offense and the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the Court, and said defendant persisted in such plea of guilty. It plainly appearing to the Court that the defendant is sane and in all things mentally competent, that the defendant's plea is free and voluntary, and defendant's plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant.

And the Court having heard all the evidence submitted for the State and the defendant and the argument of counsel is of the opinion and finds that said defendant is guilty of the offense of aggravated assault with a deadly weapon, a felony of the second degree, committed on September 29, 2000, as charged in Paragraph One of the indictment, and that defendant's punishment should be by confinement in the Institutional Division for a period of five (5) years.

The defendant in this cause with the consent of the attorney for the State has admitted defendant's guilt of the below listed unadjudicated offense(s) and has requested the Court to take same into consideration in determining sentence for the offense of which he stands charged, and all requirements of Section 12.45 (b) of the Penal Code having been complied with, the court will take such unadjudicated offense(s) into account and prosecution therefor shall hereafter be barred, to-wit: Cause No. B-02-0715-S, styled The State of Texas vs. MAGDALENO MEDINA, pending in the 119TH District Court of Tom Green County, Texas;

And Cause No. 5144, styled the State of Texas vs. MAGDALENO MEDINA, pending in the 119th District Court of Runnels, County, Texas.

The Court finds beyond a reasonable doubt that during the commission of the felony offense for which the defendant is found guilty herein, said defendant, MAGDALENO MEDINA, used and exhibited a deadly weapon, to-wit: a firearm, which in the manner of its use and intended use was capable of causing death or serious bodily injury.

IT IS, THEREFORE, CONSIDERED AND ADJUDGED by the Court that said defendant is guilty of the offense aforesaid, and that defendant be punished as found by the Court, that is, by confinement in the Institutional Division for the term of years aforesaid and that the State of Texas do have and recover of said defendant all costs in this prosecution, for which execution may issue.

Thereupon the defendant was asked by the Court whether said defendant had anything to say why sentence should not be pronounced against the defendant, and the defendant answered nothing in bar thereof. Whereupon the Court proceeded in the presence of said defendant and his counsel to pronounce sentence as follows:

IT IS ORDERED by the Court that the defendant be and is hereby sentenced to confinement in the Institutional Division for the term of years aforesaid and that the State of Texas do have and recover of said defendant all costs of this prosecution for which execution may issue against the property of said defendant, and that the defendant be delivered by the Sheriff of Tom Green County, Texas, or the authorized agent of the State of Texas, to the Director of the Institutional Division, or other person legally authorized to receive such convicts, and the said defendant shall be confined in the manner and for which period aforesaid.

The defendant having been confined during the times indicated shall be given credit on his sentence as follows, such dates inclusive:

FROM: October 3, 2000 THROUGH: May 18, 2004

In accordance with the provisions of Art. 42.03, Sec. 4, Texas Code of Criminal Procedure, the Sheriff is directed to attach to the commitment papers a statement showing (i) the time the defendant spent in jail; (ii) the time the defendant was placed in custody as of, or after, the pronouncement of sentence; and (iii) an assessment of the defendant's conduct while in jail and/or in custody.

Said defendant is hereby remanded to jail until the directions of this sentence can be obeyed.

SIGNED on the day and year first above written.

Judge Presiding

DISTRICT COURTS OF TOM GREEN COUNTY

NO. A-04-0537-S

THE STATE OF TEXAS

VS.

MAGDALENO MEDINA
MEDINA, MAGDALENA
MAG
MEDINA JR., MAGDALENO

IN THE DISTRICT COURT OF

TOM GREEN COUNTY, TEXAS

51ST JUDICIAL DISTRICT

ATTACHMENT TO JUDGMENT
DATED 2-4-2005

FINGERPRINT OF DEFENDANT
RIGHT THUMB

Mary Cole
DEPUTY SHERIFF,
TOM GREEN COUNTY

NO. A-04-0537-S

THE STATE OF TEXAS — IN THE DISTRICT COURT OF

VS — TOM GREEN COUNTY, TEXAS

MAGDALENO MEDINA — 51st JUDICIAL DISTRICT

NUNC PRO TUNC
JUDGMENT AND SENTENCE; PLEA OF GUILTY
WAIVER OF JURY TRIAL

Judge Presiding: Ben Woodward — Date of Judgment: February 4, 2005

Attorney for State: Stephen Lupton — Attorney for Defendant: Steve Herschberger

Offense Convicted of: Aggravated assault with a deadly weapon

Degree: Second — Date Offense Committed: September 29, 2000

Charging Instrument: Indictment — Plea: Guilty to Paragraph One

Terms of Plea Bargain (In Detail): Confinement in the Institutional Division of the Texas Department of Criminal Justice [hereafter referred to as the Institutional Division (ID)] for a period of five (5) years. State to abandon Paragraph Two and to proceed with Paragraph One of the indictment. Court to take into consideration #B-02-0715-S pending in the 119th District Court of Tom Green County, Texas and #5114 pending in the 119th District Court of Runnels County, Texas pursuant to Section 12.45 of the Texas Penal Code.

Plea to Enhancement Paragraph(s): Abandoned — Findings on Enhancement: N/A

Findings on Use of Deadly Weapon: The Court finds beyond a reasonable doubt that during the commission of the felony offense for which the defendant is found guilty herein, said defendant, MAGDALENO MEDINA, used and exhibited a deadly weapon, to-wit: A FIREARM, which in the manner of its use and intended use was capable of causing death or serious bodily injury.

Date Sentence Imposed: February 4, 2005 — Costs: See Bill of Costs

Punishment and Place of Confinement: Confinement in the Institutional Division for a period of five (5) years. — Date to Commence: February 4, 2005

17-11176.63

Time Credited: From: October 3, 2000 Through: May 18, 2004

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Total Amount of
Restitution/Reparation: -0-

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Concurrent Unless Otherwise Specified.

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Defendant advised of appellate rights.
Waiver filed: Yes
Date of Waiver: February 4, 2005

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On this day of February 4, 2005, in the above numbered and entitled cause came into open court MAGDALENO MEDINA, defendant, (hereinafter referred to as defendant) together with Steve Herschberger, defendant's employed attorney; and the State appeared by Stephen Lupton, District Attorney. All provisions of law pertaining service of the indictment, arraignment, time for preparation for trial and reading of the indictment, plea bargaining and any agreements relating thereto having been complied with, defendant waived the right to jury trial as to both the issues of guilt and punishment, the District Attorney consenting and the Court approving. On motion of the State and with permission of the Court, Paragraph Two of the indictment was abandoned and deleted from the indictment. Both parties announced ready for trial. A plea of guilty to Paragraph One of the indictment was entered by the defendant; the defendant was admonished by the Court of the consequences of said plea, including the range of punishment attached to the offense and the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the Court, and said defendant persisted in such plea of guilty. It plainly appearing to the Court that the defendant is sane and in all things mentally competent, that the defendant's plea is free and voluntary, and defendant's plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant.

And the Court having heard all the evidence submitted for the State and the defendant and the argument of counsel is of the opinion and finds that said defendant is guilty of the offense of aggravated assault with a deadly weapon, a felony of the second degree, committed on September 29, 2000, as charged in Paragraph One of the indictment, and that defendant's punishment should be by confinement in the Institutional Division for a period of five (5) years.

The defendant in this cause with the consent of the attorney for the State has admitted defendant's guilt of the below listed unadjudicated offense(s) and has requested the Court to take same into consideration in determining sentence for the offense of which he stands charged, and all requirements of Section 12.45 (b) of the Penal Code having been complied with, the court will take such unadjudicated offense(s) into account and prosecution therefor shall hereafter be barred, to-wit: Cause No. B-02-0715-S, styled The State of Texas vs. MAGDALENO MEDINA, pending in the 119TH District Court of Tom Green County, Texas;

And Cause No. 5144, styled the State of Texas vs. MAGDALENO MEDINA, pending in the 119th District Court of Runnels, County, Texas.

The Court finds beyond a reasonable doubt that during the commission of the felony offense for which the defendant is found guilty herein, said defendant, MAGDALENO MEDINA, used and exhibited a deadly weapon, to-wit: a firearm, which in the manner of its use and intended use was capable of causing death or serious bodily injury.

IT IS, THEREFORE, CONSIDERED AND ADJUDGED by the Court that said defendant is guilty of the offense aforesaid, and that defendant be punished as found by the Court, that is, by confinement in the Institutional Division for the term of years aforesaid and that the State of Texas do have and recover of said defendant all costs in this prosecution, for which execution may issue.

Thereupon the defendant was asked by the Court whether said defendant had anything to say why sentence should not be pronounced against the defendant, and the defendant answered nothing in bar thereof. Whereupon the Court proceeded in the presence of said defendant and his counsel to pronounce sentence as follows:

IT IS ORDERED by the Court that the defendant be and is hereby sentenced to confinement in the Institutional Division for the term of years aforesaid and that the State of Texas do have and recover of said defendant all costs of this prosecution for which execution may issue against the property of said defendant, and that the defendant be delivered by the Sheriff of Tom Green County, Texas, or the authorized agent of the State of Texas, to the Director of the Institutional Division, or other person legally authorized to receive such convicts, and the said defendant shall be confined in the manner and for which period aforesaid.

The defendant having been confined during the times indicated shall be given credit on his sentence as follows, such dates inclusive:

FROM: October 3, 2000 THROUGH: May 18, 2004

In accordance with the provisions of Art. 42.03, Sec. 4, Texas Code of Criminal Procedure, the Sheriff is directed to attach to the commitment papers a statement showing (i) the time the defendant spent in jail; (ii) the time the defendant was placed in custody as of, or after, the pronouncement of sentence; and (iii) an assessment of the defendant's conduct while in jail and/or in custody.

Said defendant is hereby remanded to jail until the directions of this sentence can be obeyed.

SIGNED NUNC this day of 7/21/06, but effective PRO TUNC on the 4th day of February, 2005 to correctly state the Cause # A-04-0537-S and that the case is filed in the 51st Judicial Distict.

Judge Presiding

17-11176.65

## Statutory Provisions Involved

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides:

(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).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Title 28, Section 2255 of the U.S. Code provides:

**28 U.S. Code § 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.

Section 2244 of Title 28 provides:

**28 U.S. Code § 2244. Finality of determination**

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A)Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B)A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C)The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D)The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E)The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed

unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

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

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Texas Penal Code § 22.01(a) & § 22.02(a) provided, in pertinent part, as follows:

> **§ 22.01. Assault**
>
> (a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
>
> * * * *
>
> **§ 22.02. Aggravated Assault**
>
> (a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:
>
> (1) causes serious bodily injury to another, including the person's spouse; or
>
> (2) uses or exhibits a deadly weapon during the commission of the assault.

Texas Penal Code §§ 22.01(a) & 22.02(a) (West 1995 & 2000 versions).[1]

[1] Petitioner was convicted of aggravated assault twice, for crimes committed in July 1995 and September 2000. *See* 5th Cir. R. 52, 59. While there have been multiple amendments to these statutes, the quoted sections have not changed.