No. 19-8838

IN THE SUPREME COURT OF THE UNITED STATES

MAGDALENO MEDINA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the denial of petitioner's motion to vacate his sentence based on Johnson v. United States, 576 U.S. 591 (2015), where petitioner failed to show that it was more likely than not that he was sentenced under the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), which was invalidated in Johnson, as opposed to the ACCA's still-valid elements clause.

2. Whether petitioner's prior convictions for Texas aggravated assault with a deadly weapon qualify as "violent felon[ies]" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Medina, No. 08-cr-41 (May 8, 2009)

Medina v. United States, No. 10-cv-88 (Oct. 10, 2012)

Medina v. United States, No. 16-cv-26 (Aug. 9, 2017)

United States Court of Appeals (5th Cir.):

United States v. Medina, No. 09-10514 (June 25, 2009)

In re: Medina, No. 16-10305 (May 3, 2016)

In re: Medina, No. 15-11180 (Jan. 8, 2016)

In re: Medina, No. 16-10664 (June 8, 2016)

United States v. Medina, No. 17-11176 (Jan. 24, 2020)

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's second motion under 28 U.S.C. 2255 to vacate his sentence (Pet. App. 1a-9a) is not published in the Federal Reporter but is reprinted at 800 Fed. Appx. 223. A prior order of the court of appeals granting petitioner's application for a certificate of appealability (Pet. App. 10a-12a) is unreported. The order of the district court denying petitioner's second 28 U.S.C. 2255 motion (Pet. App. 13a-15a) is unreported. A prior order of the court of appeals authorizing petitioner to file

a second motion under 28 U.S.C. 2255 (Pet. App. 17a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. The petition for a writ of certiorari was filed on June 22, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 1a-2a. The district court sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. C.A. ROA 161-164 (Judgment); Pet. App. 2a. The court of appeals dismissed petitioner's appeal for want of prosecution. Pet. App. 2a. In 2012, the district court denied petitioner's motion under 28 U.S.C. 2255 to vacate his conviction and sentence and declined to issue a certificate of appealability (COA). 10-cv-88 D. Ct. Doc. 13 (Oct. 10, 2012). In 2016, petitioner sought authorization to file a second Section 2255 motion to challenge his sentence in light of Johnson v. United States, 576 U.S. 591 (2015), which the court of appeals granted. Pet. App. 17a-18a. The district court denied petitioner's motion and declined to issue a COA. Id. at 13a-16a. The court of appeals granted a COA, id. at 10a-12a, and affirmed, id. at 1a-9a.

1. On July 15, 2008, petitioner was in a single-vehicle accident after which he abandoned his car. C.A. ROA 152. Officers with the San Antonio Police Department quickly located petitioner, who acknowledged that he had been the driver of the car but refused to take a field sobriety test. Ibid. The officers arrested petitioner for driving while intoxicated and leaving the scene of an accident. Ibid. Officers later conducted an inventory search of petitioner's car and discovered a .38-caliber revolver, which petitioner, who was a convicted felon, admitted that he knowingly possessed. Ibid.; Presentence Investigation Report (PSR) ¶¶ 13-14.

A federal grand jury in the Northern District of Texas returned an indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). C.A. ROA 110-111 (Indictment). A conviction for violating Section 922(g)(1) carries a default sentencing range of zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for a "violent felon[ies]" or "serious drug offense[s]," that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison 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.

18 U.S.C. 924(e)(2)(B). Clause (i) is known as the "elements clause"; the first part of clause (ii) is known as the "enumerated offenses clause"; and the latter part of clause (ii), beginning with "otherwise," is known as the "residual clause." Welch v. United States, 136 S. Ct. 1257, 1261 (2016).

Following his indictment, petitioner and the government entered into a plea agreement. C.A. ROA 144-150 (Plea Agreement), 151-154 (Factual Resume). As part of the plea agreement, petitioner signed a factual resume, admitting that he had been convicted of three prior Texas felonies -- two convictions of aggravated assault with a deadly weapon and a conviction of possession with intent to distribute cocaine -- and that "each of these convictions qualifies as either a 'violent felony' or 'serious drug offense.'" Id. at 153. He further agreed that, as a result of those three prior convictions, he was "subject to the enhanced penalty provision in 18 U.S.C. § 924(e)." Ibid. The district court accepted petitioner's plea. Id. at 143.

The Probation Office's presentence report identified the same three prior Texas convictions as ACCA predicates. PSR ¶¶ 15-17, 23, 32-34. Consistent with petitioner's plea agreement and the presentence report, the sentencing court found that petitioner's

three prior Texas felony convictions satisfied the prerequisites for an enhanced sentence under the ACCA and sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 2a; C.A. ROA 160-163 (Judgment). Petitioner filed a notice of appeal, but the appeal was dismissed for want of prosecution. Pet. App. 2a.

2. In 2010, petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence. 10-cv-88 D. Ct. Doc. 1 (Sept. 20, 2010). The district court denied the motion and declined to issue a COA, 10-cv-88 D. Ct. Doc. 13 (Oct. 10, 2012), and petitioner did not request a COA from the court of appeals.

3. In 2015, this Court concluded in Johnson, supra, that the ACCA's residual clause is unconstitutionally vague. 576 U.S. at 597. This Court subsequently held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. See Welch, 136 S. Ct. at 1268.

In 2016, the court of appeals granted petitioner leave to file a second Section 2255 motion to vacate his sentence. Pet. App. 17a-18a. In his second Section 2255 motion, petitioner argued that Johnson established that he was wrongly sentenced under the ACCA because it precluded classifying his Texas aggravated assault convictions as violent felonies under the ACCA's residual clause. C.A. ROA 187-194.

The district court denied that Section 2255 motion. Pet. App. 13a-15a. The court determined that petitioner's sentence

remained valid because his aggravated assault convictions still qualified as violent felonies under the ACCA's elements clause. Id. at 14a. The court also found that petitioner had "failed to show that he was sentenced under the residual clause of the ACCA" in the original proceedings, because "nothing in the record indicat[ed] that any of [petitioner's] convictions were ever considered under the statute's residual clause." Ibid. The court reasoned that, because "Johnson d[id] not directly apply," petitioner's motion was "otherwise time-barred because it was filed more than one year after the Court's judgment became final," and the court rejected "any argument seeking relief under" other intervening decisions interpreting the ACCA on the ground that they were not retroactive on collateral review. Ibid.; see id. at 14a-15a. The court declined to issue a COA. Id. at 15a.

4. The court of appeals granted a COA, Pet. App. 10a-12a, and affirmed the district court's denial of relief in an unpublished opinion, id. at 1a-9a. The court observed that, under circuit precedent, "[t]o 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.'" Id. at 4a (quoting United States v. Clay, 921 F.3d 550, 559 (5th Cir. 2019), cert denied, 140 S. Ct. 866 (2020)). In making that determination, the court noted that courts

> "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."

Id. at 4a-5a (quoting United States v. Wiese, 896 F.3d 720, 724-725 (5th Cir. 2018), cert. denied, 139 S. Ct. 1328 (2019)). The court characterized that requirement as "jurisdictional." Pet. App. 5a n.3.

The court of appeals found that petitioner had not "met his burden of showing that it was more likely than not that the sentencing judge relied on the residual clause" when determining that his two convictions for Texas aggravated assault with a deadly weapon were "violent felonies." Pet. App. 5a. The court noted that petitioner failed to "present[] any tangible evidence suggesting the sentencing court relied on the residual clause." Id. at 6a. The court emphasized that neither the factual resume that petitioner signed as part of his plea agreement nor the presentence report contained any indication that the residual clause provided the basis for classifying his Texas aggravated assault convictions as ACCA predicates. Ibid. In addition, the court noted that "[n]o transcript of the sentencing hearing has been produced in the record." Ibid. Accordingly, the court found that petitioner had not identified "any evidence suggesting explicit reliance on the residual clause." Ibid.

The court of appeals also rejected petitioner's contention that the sentencing court "must have relied on the residual clause" because, "at the time of sentencing, [his] offense could not

satisfy ACCA's elements clause." Pet. App. 6a (citation omitted; brackets in original). The court explained that years before petitioner's sentencing, it had held in United States v. Martinez, 962 F.2d 1161 (5th Cir. 1992), "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." Pet. App. 7a (quoting Martinez, 962 F.2d at 1168-1169) (brackets in original). In addition, the court observed that "mere months after [petitioner]'s sentencing," it had relied on Martinez in "affirm[ing] an ACCA sentencing enhancement premised on a Texas aggravated assault conviction." Id. at 8a; see United States v. Sneed, 329 Fed. Appx. 563 (5th Cir. 2009) (per curiam), cert denied, 559 U.S. 907 (2010). And the court reviewed the decisions cited by petitioner and emphasized that no case "upset[] the core holding of Martinez -- that aggravated assault with a deadly weapon was a 'violent felony' under the elements clause." Pet. App. 8a.

The court of appeals accordingly found that, when petitioner was sentenced, it was "settled" that a conviction for Texas aggravated assault with a deadly weapon was a predicate ACCA conviction under the elements clause. Pet. App. 8a. And the court added, "[e]ven assuming [petitioner] could convince this Court that there was uncertainty surrounding the offense, his ultimate claim would not fare any better," because "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," ibid.

(citation omitted; brackets in original), not that the sentencing court more likely than not relied on that clause.

ARGUMENT

Petitioner contends (Pet. 7-17) that the court of appeals erred in treating its requirement that a claimant show that his ACCA enhancement more likely than not was based on the residual clause as a prerequisite for relief on a claim premised on the invalidation of that clause in Johnson v. United States, 135 S. Ct. 2551 (2015), as a jurisdictional prerequisite. Although petitioner is correct that the requirement is not jurisdictional, it is nonetheless mandatory; the government was entitled to assert it on appeal; and the court of appeals was not precluded from affirming the district court's denial of petitioner's Section 2255 motion on that ground. The proper characterization of the requirement does not warrant this Court's review, and the unpublished disposition below would not provide a suitable vehicle for review in any event. Petitioner also asks this Court (Pet. 5-7) to hold this petition for a writ of certiorari pending its decision in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020). That request lacks merit, because petitioner would not be entitled to relief regardless of how this Court disposes of Borden.

1. A federal prisoner generally may not obtain postconviction relief unless he establishes that his sentence was "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a). In addition, under 28 U.S.C. 2255(h)

and as relevant here, a second or successive motion for postconviction relief may not be filed unless a court of appeals certifies that it contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2). While the court need only determine that the prisoner has made a "prima facie" showing to that effect to authorize a second or successive motion, 28 U.S.C. 2244(b)(3)(C); see 28 U.S.C. 2255(h), the district court "shall dismiss" a claim in a second or successive habeas application if it does not in fact rely on a new retroactive rule of constitutional law, 28 U.S.C. 2244(b)(4); see 28 U.S.C. 2255(h).

a. Petitioner does not dispute in this Court that a prisoner who fails to prove that his ACCA sentence actually depended on application of the constitutionally invalid residual clause, rather than one of the still-valid clauses, fails to carry his burden of demonstrating a constitutional violation that would entitle him to collateral relief. See Pet. App. 8a-9a. Nor does he dispute the court of appeals' determination that he failed to make such a showing. Petitioner instead contends (Pet. 7-14) that the court of appeals erred in looking to such a requirement because it is nonjurisdictional and, in his view, the government did not adequately assert that petitioner failed to make the required showing in the courts below. Petitioner is correct that the requirement that a court "shall dismiss any claim presented in a

second or successive application * * * unless the applicant shows that the claim satisfies" the applicable requirements, 28 U.S.C. 2244(b)(4) -- here, that it relies on a new retroactive rule of constitutional law, see 28 U.S.C. 2255(h) -- is non-jurisdictional. But while Section 2244(b)(4) is not jurisdictional, it remains a mandatory claim-processing rule because it mandates a particular consequence -- dismissal -- when certain conditions, such as failure to demonstrate that the claim relies on a new retroactive rule of constitutional law, are met. See Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435, 439 (2011). Petitioner is accordingly incorrect that the requirement's non-jurisdictional nature rendered the court of appeals' disposition erroneous.

It is well-settled that a "prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977); see Dahda v. United States, 138 S. Ct. 1491, 1498-1500 (2018) (affirming on an alternative ground that the government raised for the first time in response to the petition for a writ of certiorari). And, unlike a case in which the government effects a "deliberate waiver" of a threshold bar, Wood v. Milyard, 566 U.S. 463, 466 (2012), the government here merely did not invoke in the district court one of multiple threshold bars to relief. It gave no indication that it affirmatively intended to relinquish the argument that petitioner

failed to make the mandatory Section 2244(b)(4) showing that his claim relied on Johnson. And the district court itself identified petitioner's failure to show that the original sentence was premised on Johnson. See Pet App. 14a ("[T]here is nothing in the record indicating that any of these convictions were ever considered under the [ACCA's] residual clause."); see also ibid. ("[B]ecause Johnson does not directly apply," petitioner's claim is "time-barred.") (emphasis added).

The government squarely presented the Section 2244(b)(4) argument as a ground for affirmance in its briefing in the court of appeals, and petitioner made responsive arguments. See Gov't C.A. Br. 27-28 (asserting that petitioner "must show that the sentencing court 'more likely than not' relied upon the residual clause to sentence him under the ACCA"); id. at 24-30; Pet. C.A. Br. 9. Petitioner's failure to demonstrate that his claim relied on Johnson thus remained a valid basis for affirmance under those circumstances -- where the government never waived reliance on that ground, the government presented it in the court of appeals, and petitioner had adequate opportunity to address it. See Wood, 566 U.S. at 473 ("[C]ourts of appeals, like district courts, have the authority * * * to raise a forfeited * * * defense on their own initiative" in the collateral review context.); Day v. McDonough, 547 U.S. 198, 211 (2006) (explaining that a court may consider a bar not pressed by the government where "nothing in the record suggests that the [government] 'strategically' withheld the

defense or chose to relinquish it" and where the parties have had "fair notice and an opportunity to present their positions").

Contrary to petitioner's assertion, the court of appeals did not engage in a "'takeover of the appeal.'" Pet. 11 (quoting United States v. Sineneng-Smith, 140 S. Ct. 1575, 1581 (2020)). In Sineneng-Smith, this Court vacated a court of appeals decision invalidating a criminal conviction under the First Amendment's overbreadth doctrine where the defendant had not raised that doctrine and the court of appeals had itself injected the issue into the case, inviting supplemental briefing on it from nonparty organizations. 140 S. Ct. at 1580-1581. The court of appeals did not improperly engage in a "takeover of the appeal," id. at 1581, in this case by adopting a basis for affirmance presented by the government and relied on by the district court.

b. Petitioner asserts (Pet. 14-17) that this Court's review is warranted because the court of appeals' characterization of Section 2244(b)(4) as jurisdictional conflicts with the Sixth Circuit's decision in Williams v. United States, 927 F.3d 427 (6th Cir. 2019). For the reasons set forth above, however, petitioner has not demonstrated that the use of the jurisdictional label in the decision below affected the outcome of his appeal, because the court could appropriately dispose of the appeal on Section 2244(b)(4) grounds regardless of whether that section is jurisdictional or a mandatory claim-processing rule. This case would thus present a poor vehicle to resolve that conflict.

In any event, the shallow conflict identified by petitioner would not warrant this Court's review because it is of limited practical significance. Whether a prisoner's non-compliance with Section 2244(b)(4) is a jurisdictional requirement or a mandatory claim-processing rule has no real-world impact in the mine run of cases in which the government affirmatively raises the Section 2244(b)(4) ground in opposing a second or successive Section 2255 motion, either in the district court or in the court of appeals. The jurisdictional status of Section 2244(b)(4) would matter only if the government deliberately waived reliance on that section but a federal court found that it was required to deny relief on the basis of Section 2244(b)(4) because it is jurisdictional. Petitioner has provided no basis to conclude that such cases are recurrent, and, in any event, this case does not fall within that category.

2. Petitioner also asks this Court (Pet. 5-7) to hold his petition for Borden, supra (No. 19-5410), which presents the question whether a crime committed with the mens rea of recklessness can involve the "use of physical force" under the ACCA's elements clause, 18 U.S.C. 924(e)(2)(B)(i). That request lacks merit. As noted above, petitioner does not dispute in this Court that Section 2244(b)(4) permits a Section 2255 petition to proceed only to the extent that it relies on a new rule of constitutional law, which here would need to be the rule announced in Johnson that was made retroactive by this Court in Welch. And

because petitioner has not asserted in this Court any outcome-determinative flaw in the court of appeals' determination that his claim does not depend on Johnson, he will not be entitled to relief on his Section 2255 motion irrespective of the Court's resolution of the purely statutory question in Borden.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020

* Contrary to petitioner's assertion, Borden comes to this Court on direct appeal, see Pet. at 2, Borden, supra (No. 19-5410); it does not "arise[] in the context of 28 U.S.C. § 2255," Pet. 7.