

No. 19-8838

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In the  
**Supreme Court of the United States**

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

v.

UNITED STATES OF AMERICA,  
*RESPONDENT,*

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

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REPLY BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. In Texas, a defendant is guilty of aggravated assault if he recklessly causes another person to suffer serious bodily injury (or if he recklessly causes another person to suffer bodily injury using some instrument in a way that is capable of causing serious bodily injury). Is Texas aggravated assault categorically a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)?

2. The Fifth Circuit granted authorization for Petitioner to file a successive motion to vacate his federal sentence containing and relying on the new constitutional rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Did the lower courts have jurisdiction to adjudicate his claim on the merits?

## REPLY BRIEF FOR PETITIONER

The parties agree that the Fifth Circuit got its jurisdictional analysis wrong in this case. The Fifth Circuit held that an authorized successive movant under 28 U.S.C. § 2255(h) must “prove” that the sentencing court originally “relied on” the ACCA’s residual clause, and if he fails to make that showing, the district court has no subject-matter jurisdiction to resolve the case. Pet. App. 5a n.5. Respondent says that is wrong. U.S. Br. 9 (“[P]etitioner is correct that the requirement is not jurisdictional.”). That is really all the Court needs to know before holding this petition to await the outcome of *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020). If Borden prevails, then that will mean Mr. Medina is not an Armed Career Criminal, either. His aggravated assault convictions arose from a statute materially identical to the Tennessee statute underlying Borden’s conviction.

1. Before filing a successive motion to vacate under 28 U.S.C. § 2255(h)(2), a federal prisoner must secure prefiling authorization that his proposed motion “contains” a new constitutional rule the Supreme Court has made retroactive that was previously unavailable. Mr. Medina did that. Pet. App. 17a–18a. The statutes governing his motion require nothing more.

2. Even so, the Fifth Circuit has held that a movant in Mr. Medina’s shoes must comply with other dubious procedural hurdles, none of which appear in § 2255. Pet. 4–5. For example, the Fifth Circuit has held that federal prisoner must also convince a *district court* that he satisfies the “gatekeeping” requirements for a successive motion, even though the relevant statute, § 2244(b)(4), applies only to *state court* prisoners who file a successive petition for habeas corpus. The Fifth

Circuit has also held that this gatekeeping step somehow requires a defendant to prove “by a preponderance of the evidence” that a sentencing judge was actually thinking about the ACCA’s residual clause at the time of sentencing. *See* Pet. App. 5a (quoting *United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019)). As explained in the petition, that “requirement” is nowhere to be found in the text of 28 U.S.C. § 2255(h). It’s not in § 2244, either. It appears to be invented out of whole cloth.

3. To the extent *Wiese* and *Clay* arise from any statutory concern at all, it is undisputed that the requirement can be waived, and Respondent waived it. Respondent chose to defend this case only on the merits in the district court, and the lower courts should have honored that choice.

4. While conceding that *Wiese* and *Clay* do not represent a jurisdictional barrier to consideration of the merits of Mr. Medina’s motion, Respondent argues that they do impose a mandatory “claims-processing” barrier that is also absent from the statute. According to Respondent, it can be forgiven for failing to raise this imagined barrier in district court because it raised the matter in the Fifth Circuit, after the Fifth Circuit decided that there was a jurisdictional rule.

5. That was not what the Fifth Circuit held. The Fifth Circuit never had a chance to consider whether it would allow the Government to invoke any “claims-processing” rules it once waived, because, again, the Fifth Circuit considers the made-up *Wiese-Clay* rule to have jurisdictional significance, and the court refused to consider Petitioner’s contrary arguments below. Pet. App. 5a n.5. Even if—as Respondent contends—the rule truly exists, but it is only a claims-processing rule,

then the Fifth Circuit should be told so before resolving Mr. Medina's motion. The Fifth Circuit should probably have an opportunity to consider, in the first instance, whether to allow the Government to resurrect this non-jurisdictional argument after abandoning it in the district court. This Court probably should not be the first to consider that question, especially while the underlying merits of Mr. Medina's authorized motion are still up for debate in *Borden* and similar cases.

6. That leaves one of two options: the Court can set the case for a decision on the merits of *the jurisdictional* issue, or it can simply remand for the Fifth Circuit to re-consider this case under *Borden* and under the Solicitor General's concession.

7. True, the Fifth Circuit might decide that it will allow the Government to raise this non-statutory, non-jurisdictional "rule" despite saying nothing about it in district court. But it is just as likely that the Court would not allow the Government to resurrect a non-jurisdictional procedural defense. The Fifth Circuit already granted a Certificate of Appealability on Mr. Medina's argument that the district court erred in *sua sponte* raising the issue of timeliness when the Government waived *that* procedural defense. Pet. App. 11a. There is no reason why the *Wiese-Clay* defense would be treated differently.

8. The Fifth Circuit's application of procedural rules might be influenced by the fact that Mr. Medina is likely *actually innocent* of the ACCA enhancement. *Cf. Dretke v. Haley*, 541 U.S. 386, 393–94 (2004). That, too, is a reason to await the outcome of *Borden* before resolving this petition.

9. *Borden* will almost certainly reveal whether Mr. Medina is eligible for his ACCA-enhanced sentence. Obviously, the courts will look differently on his claims if *Borden* confirms that he is suffering an illegal and unconstitutional sentence. The Fifth Circuit should have a chance to revisit its dubious “jurisdictional” ruling in light of the clarity that will be provided by *Borden*.

10. If the Government still wants to defend Mr. Medina’s sentence after *Borden* reveals it to be unlawful, then it might be appropriate to grant certiorari and appoint an *amicus* to argue that *Wiese-Clay* represents a truly “jurisdictional” rule, allow Respondent to argue that *Wiese-Clay* represents a mandatory claims-processing rule that can be resurrected and deployed against a non-ACCA defendant on appeal despite its being waived in district court, and allow Petitioner to argue that 28 U.S.C. § 2255 means what it says, and nothing more. Petitioner would be more than happy to defend the adequacy of the text Congress actually enacted against the supposed merits of any made-up procedural rule, whether jurisdictional or not.

## CONCLUSION

Petitioner asks that this Court (a) hold the petition pending a decision in *Borden*; and then (b) either (i) grant the petition to resolve the circuit conflict regarding the so-called “jurisdictional” application of § 2244(b)(4) to an authorized successive § 2255 motion, or (ii) remand to the Fifth Circuit with instructions to reconsider the “jurisdictionality” of *Wiese* and *Clay* in light of the Solicitor General’s concession here.

Respectfully submitted,

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