No. 20-5172

IN THE SUPREME COURT OF THE UNITED STATES

DARRELL HENRY WILLIAMS, PETITIONER

v.

JOE COAKLEY, WARDEN

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2255, a federal prisoner has the opportunity to collaterally attack his sentence once on any ground cognizable on collateral review, with "second or successive" attacks limited to certain claims that indicate factual innocence or that rely on constitutional-law decisions made retroactive by this Court. 28 U.S.C. 2255(h). Under 28 U.S.C. 2255(e), an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

The question presented is whether petitioner is entitled to seek federal habeas corpus relief under Section 2241 based on his claim that the Missouri offense of reckless second-degree assault, Mo. Rev. Stat. 565.060.1 (1978), is not a "crime of violence" under the career-offender provision of Sentencing Guidelines § 4B1.2, when he had an unobstructed opportunity to raise that claim at the time of his sentencing and first motion for collateral relief under Section 2255.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

United States v. Williams, No. 99-cr-486 (Mar. 2, 2001)

Williams v. United States, No. 04-cv-1 (Mar. 29, 2007)

United States District Court (N.D. W. Va.):

Williams v. Coakley, No. 18-cv-46 (Oct. 29, 2019)

United States Court of Appeals (8th Cir.):

United States v. Williams, No. 01-1608 (July 3, 2002)

United States v. Williams, No. 07-1954 (Apr. 21, 2008)

United States v. Williams, No. 16-2821 (Nov. 9, 2017)

United States v. Williams, No. 16-2902 (Nov. 9, 2017)

United States Court of Appeals (4th Cir.):

Williams v. Coakley, No. 19-7737 (Apr. 17, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 801 Fed. Appx. 170. The opinion of the district court (Pet. App. 3-8) is not published in the Federal Supplement but is available at 2019 WL 5576941.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2020. The petition for a writ of certiorari was filed on July 14, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1), and one count of escape from custody, in violation of 18 U.S.C. 751(a). 99-cr-486 Judgment 1. He was sentenced to 310 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The Eighth Circuit affirmed, 295 F.3d 817, 818, and the district court denied a subsequent motion under 28 U.S.C. 2255 to vacate, set aside, or correct petitioner's sentence. The district court and Eighth Circuit denied a certificate of appealability. 04-cv-1 D. Ct. Doc. 47, at 39 (Mar. 29, 2007); 07-1954 Judgment. The Eighth Circuit later denied authorization to file a second or successive Section 2255 motion. 16-2902 Judgment. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the district of his confinement, which the district court dismissed for lack of jurisdiction. Pet. App. 3-19. The Fourth Circuit affirmed. Id. at 1-2.

1. In October 1999, petitioner and a co-conspirator traveled from St. Louis, Missouri, to Houston, Texas, where they purchased cocaine and divided it up to be flown back to St. Louis by three other co-conspirators. Presentence Investigation Report (PSR) ¶¶ 9-13, 17-18. Federal officers interdicted petitioner and

his four co-conspirators when they arrived back in St. Louis, seizing a total of 986 grams of cocaine and $10,420 in currency. Ibid.

Petitioner pleaded guilty to federal drug-trafficking charges, but while incarcerated awaiting sentencing, petitioner escaped from the custody of the U.S. Marshals at the Jennings Jail in Jennings, Missouri, by cutting a hole in a wire mesh ceiling leading to the roof of the facility. PSR ¶¶ 14-15. Three days later, petitioner was found at a residence in St. Louis, where he verbally threatened U.S. Marshals and claimed that he was armed with a hand grenade, although no weapons were found in his possession upon his arrest. PSR ¶ 15.

2. Petitioner withdrew his prior guilty plea and proceeded to trial on a superseding indictment charging him with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1), and escape from custody, in violation of 18 U.S.C. 751(a). PSR ¶ 16. A jury found him guilty on both counts. PSR ¶¶ 1-3.

The presentence report prepared by the Probation Office recommended that petitioner be sentenced as a "career offender" under Sentencing Guidelines § 4B1.1, which increased a defendant's Guidelines range if, among other things, "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1 (2000); see PSR ¶¶ 27, 36. Then, as now, pursuant to Sentencing

Guidelines § 4B1.2(a)(1), the definition of the term "crime of violence" encompassed an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1) (2000). At that time, an alternative definition in Sentencing Guidelines § 4B1.2(a)(2) extended to an offense that "involves conduct that presents a serious potential risk of physical injury to another." Sentencing Guidelines § 4B1.2(a)(2) (2000).

The presentence report did not specify which of petitioner's prior convictions qualified as "crime[s] of violence" under the career-offender provision, but listed Missouri convictions for, among other things, second-degree assault and first-degree robbery. See PSR ¶¶ 59, 68; Pet. App. 16-17. According to the presentence report, petitioner's career-offender status resulted in an offense level of 34, a criminal history category of VI, and a then-mandatory Guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 31, 76, 97. Without the career-offender designation, petitioner's Guidelines range would have been 188 to 235 months of imprisonment (offense level 31, criminal history category VI). See PSR ¶¶ 30, 76.

The district court sentenced petitioner to 310 months of imprisonment. Pet. App. 10. The Eighth Circuit affirmed. 295 F.3d 817.

3. In 2003, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, asserting that he had received ineffective assistance of counsel. As relevant here, petitioner acknowledged that his second-degree-assault conviction and his first-degree-robbery conviction met the definition of "crime of violence" in the Sentencing Guidelines. See 04-cv-1 D. Ct. Doc. 47, at 32. He argued, however, that his lawyers were ineffective for failing to assert that he could not be sentenced as a career offender because the government failed to provide adequate notice it would use those convictions to enhance his sentence and because the convictions did not occur temporally close enough to his federal conviction to count as career-offender predicates. Id. at 8-10, 32-35. The district court rejected these claims and denied the motion. Ibid. The district court and the court of appeals both denied a certificate of appealability. Id. at 39; 07-1954 Judgment.

4. In Johnson v. United States, 576 U.S. 591 (2015), this Court concluded that the so-called "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), which defined the term "violent felony" to include an offense involving "conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), was unconstitutionally vague. The Court subsequently determined in Welch v. United States, 136 S. Ct. 1257, 1263 (2016) (per curiam), that Johnson's holding applies retroactively.

Petitioner filed an application in the Eighth Circuit for permission to file a second or successive motion for collateral relief under 28 U.S.C. 2255. Petitioner asserted that under Johnson, Sentencing Guidelines § 4B1.2(a)(2) (2000) was invalid and that his conviction for second-degree assault no longer qualified as a crime of violence absent the residual clause. 16-2902 Pet. The Eighth Circuit denied the application. 16-2902 Judgment.

5. In 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Northern District of West Virginia, the district of his confinement, in which he sought to challenge his classification and sentence as a career offender under the Sentencing Guidelines. Relying on Johnson, petitioner argued that Section 4B1.2(a)(2) had been unconstitutionally vague and that Missouri second-degree assault was not a crime of violence under Section 4B1.2(a)(1)'s "elements clause" because it proscribed "attempting to cause or causing serious physical injury (including the nonviolent conduct of offering poison, creating a surprise road block, [and] locking a person in a container)." 18-cv-46 D. Ct. Doc. 1, at 6 (Mar. 26, 2018).

The district court referred the petition to a magistrate judge for a report and recommendation. Pet. App. 9. The magistrate judge determined that petitioner's habeas petition was barred by

28 U.S.C. 2255(e), which provides that an "application for a writ of habeas corpus [under 28 U.S.C. 2241] in behalf of a prisoner who is authorized to apply for relief by motion pursuant to" Section 2255 "shall not be entertained * * * unless it * * * appears that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." See Pet. App. 13. The magistrate judge explained that under governing Fourth Circuit precedent, in order to satisfy the "saving clause" in Section 2255(e) and seek habeas relief under Section 2241, petitioner had to establish an intervening change in law after the time of his sentencing that undermined the legality of his sentence. Id. at 14 (citing United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019)). The magistrate judge explained that petitioner could not satisfy that standard because his conviction for second-degree assault qualified as a crime of violence under the elements clause of Sentencing Guidelines § 4B1.2(a)(2) (2000). The magistrate judge cited United States v. Vinton, 631 F.3d 476, 485 (8th Cir.), cert. denied, 565 U.S. 866 (2011), which held that Missouri second-degree assault through attempting to cause or knowingly causing physical injury to another person by means of a deadly weapon, in violation of Mo. Rev. Stat. 565.060.1(2), qualifies as a violent felony under the similarly worded elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). Pet. App. 17. The magistrate judge also

noted that according to the presentence report, petitioner was convicted of second-degree assault because he had engaged in a high-speed car chase with police and "fired two shots from a .25 caliber automatic handgun at the officers, who had exited their patrol car." Ibid.

Petitioner objected to the magistrate judge's report and recommendation, arguing for the first time that Missouri second-degree assault was not a crime of violence under Sentencing Guidelines § 4B1.2(a)(2), on the theory that the elements clause does not include offenses that can be committed with a mens rea of recklessness. See Pet. App. 5. The district court overruled the objection and found that Section 2255(e) barred petitioner's habeas petition "for substantially the reasons stated by the magistrate judge." Id. at 6. The court determined, in relevant part, that petitioner could not meet the requirements of the Section 2255(e) saving clause because his second-degree-assault conviction qualified as a crime of violence under the elements clause of the career-offender guideline. Id. at 6-7.

6. The court of appeals affirmed. Pet. App. 1-2. The court described its standard set forth in Wheeler, supra, for establishing, under the saving clause, that Section 2255 is inadequate and ineffective to challenge the legality of a prisoner's sentence, thereby permitting a prisoner to challenge his sentence via a habeas petition under 28 U.S.C. 2241. Pet.

App. 2. The court stated that it had "reviewed the record and f[ound] no reversible error," and accordingly "affirm[ed] for the reasons stated by the district court." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 15-24) that his conviction for second-degree assault, in violation of Mo. Rev. Stat. 565.060.1 (1978), does not qualify as a crime of violence under Sentencing Guidelines § 4B1.2(a)(2) (2000) because the crime can be committed with a mens rea of recklessness, and that the saving clause of 28 U.S.C. 2255(e) permits him to raise this claim in a habeas petition under 28 U.S.C. 2241. This Court has granted review in Borden v. United States, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), to address the question whether an offense that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" in the similarly worded elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). The Court need not hold this petition pending Borden, however, because regardless of the outcome in Borden, 28 U.S.C. 2255(e) forecloses petitioner's habeas petition. Although there is a circuit conflict on the scope of the saving clause, this case does not provide a suitable vehicle to resolve that conflict because petitioner would not be entitled to pursue his habeas petition even under the most prisoner-friendly interpretation of the saving

clause adopted by the courts of appeals. Further review is not warranted.

1. The Eighth Circuit has "held that the Missouri second-degree assault statute is divisible because it defines multiple offenses," one of which is assault by recklessly causing serious physical injury to another person. United States v. Welch, 879 F.3d 324, 326 (8th Cir. 2018) (per curiam); see Mo. Rev. Stat. 565.060.1(2) (1978). The current record in this case does not appear to contain documentation that would enable a determination of whether petitioner's second-degree-assault conviction was for a different form of the offense. See generally Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). Nevertheless, there is no basis to hold the petition pending the outcome of Borden, because the saving clause of 28 U.S.C. 2255(e) does not permit petitioner to use a habeas petition under 28 U.S.C. 2241 to challenge his sentencing as a career offender on the theory that Section 4B1.2(a)(1)'s elements clause does not cover reckless crimes.

Under the saving clause, a federal prisoner may file a petition for a writ of habeas corpus only if "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). Two courts of appeals have determined that Section 2255(e) does not permit habeas relief based on an intervening decision of statutory interpretation. See McCarthan v. Director of Goodwill Indus.-

Suncoast, Inc., 851 F.3d 1076 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017); Prost v. Anderson, 636 F.3d 578, 584, 590 (10th Cir. 2011), cert. denied, 565 U.S. 1111 (2012). For the reasons stated on pages 10 to 17 of the government's brief in opposition in Hueso v. Barnhart, No. 19-1365 (filed Sept. 11, 2020), that understanding reflects a correct interpretation of Section 2255(e).*

Nine other courts of appeals -- including the court below -- have held, however, that the saving clause of Section 2255(e) allows a federal prisoner to file a habeas petition under Section 2241 based on a retroactive decision of statutory construction in at least some circumstances. See United States v. Barrett, 178 F.3d 34, 50-53 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); Triestman v. United States, 124 F.3d 361, 375-378 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251-252 (3d Cir. 1997); In re Jones, 226 F.3d 328, 333-334 (4th Cir. 2000); Reyes-Requena v. United States, 243 F.3d 893, 902-904 (5th Cir. 2001); Wooten v. Cauley, 677 F.3d 303, 306-307 (6th Cir. 2012); In re Davenport, 147 F.3d 605, 609-612 (7th Cir. 1998); Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); In re Smith, 285 F.3d 6, 7-8 (D.C. Cir. 2002); see also Abdullah v. Hedrick, 392 F.3d 957, 960-964 (8th Cir. 2004) (discussing

* We have served petitioner with a copy of the government's brief in opposition in Hueso, which is also available on the Court's electronic docket.

majority rule without expressly adopting it), cert. denied, 545 U.S. 1147 (2005).

Although those courts have offered varying rationales and have adopted somewhat different formulations, they generally all take the view that the remedy provided by 28 U.S.C. 2255(e) is "inadequate or ineffective to test the legality of [a prisoner's] detention" if (1) an intervening decision of this Court has narrowed the reach of a federal criminal statute, such that the prisoner now stands convicted of conduct that is not criminal; and (2) controlling circuit precedent squarely foreclosed the prisoner's claim at the time of his trial (or plea), appeal, and first motion under Section 2255. See, e.g., Reyes-Requena, 243 F.3d at 902-904; In re Jones, 226 F.3d at 333-334; In re Davenport, 147 F.3d at 600-612. Several circuits have also held that a prisoner may be entitled to habeas relief if an intervening decision, made retroactive on collateral review, has since established that the prisoner has been sentenced in excess of an applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., United States v. Wheeler, 886 F.3d 415, 429-434 (4th Cir. 2018), cert. denied, 139 S. Ct. 1318 (2019); Hill v. Masters, 836 F.3d 591, 594-600 (6th Cir. 2016); Brown v. Rios, 696 F.3d 638, 640-641 (7th Cir. 2012).

Notwithstanding that circuit conflict and its importance, this Court has recently and repeatedly declined to review the issue, including when it was raised in the government's petition for a writ of certiorari in Wheeler, supra (No. 18-420), seeking review of a decision of the Fourth Circuit. See Higgs v. Wilson, 140 S. Ct. 934 (2020) (No. 19-401); Walker v. English, 140 S. Ct. 910 (2020) (No. 19-52); Quary v. English, 140 S. Ct. 898 (2020) (No. 19-5154); Jones v. Underwood, 140 S. Ct. 859 (2020) (No. 18-9495); Dyab v. English, 140 S. Ct. 847 (2020) (No. 19-5241). The division of authority is not, moreover, implicated in this case, because petitioner would not be entitled to relief under any circuit's view of the saving clause. Indeed, the decision below reflects the judgment of a circuit with an expansive, prisoner-favorable view of the saving clause that the clause does not permit the particular habeas petition that petitioner has filed here. See Pet. App. 2.

As discussed, see p. 12, supra, the circuits that construe the saving clause most broadly generally have required a prisoner to show (1) that the prisoner's claim was foreclosed by (erroneous) precedent at the time of the prisoner's first motion under Section 2255; and (2) that an intervening decision of statutory interpretation, made retroactive on collateral review, has since established that the prisoner is in custody for an act that the law does not make criminal, has been sentenced in excess of an

applicable maximum under a statute or under a mandatory Sentencing Guidelines regime, or has received an erroneous statutory minimum sentence. See, e.g., Wheeler, 886 F.3d at 429-434; Hill, 836 F.3d at 594-600; Brown, 696 F.3d at 640-641. For at least two independent reasons, petitioner cannot satisfy those requirements.

First, petitioner has not shown that his claim was foreclosed at the time of his first Section 2255 motion by any since-abrogated precedent. Petitioner had an unobstructed opportunity at the time of his sentencing and direct appeal to argue that his career-offender designation was erroneous on the theory that reckless assault, in violation of Mo. Rev. Stat. 565.060.1(2) (1978), is not a crime of violence under Section 4B1.2. Binding precedent did not foreclose that argument. To the contrary, in United States v. Ossana, 638 F.3d 895 (2011), the Eight Circuit -- where petitioner was convicted and where his post-conviction Section 2255 motion was filed -- specifically held that the Missouri offense of reckless second-degree assault is not a crime of violence under the elements clause. See id. at 903; see also United States v. Fields, 863 F.3d 1012 (8th Cir. 2017) (reaffirming Ossana). Ossana did not abrogate any prior precedent, and to the extent that petitioner's challenge to his Guidelines range is cognizable on collateral review at all, he could have raised that challenge in his first Section 2255 motion. For that reason, no circuit would conclude under the circumstances that Section 2255

was "inadequate or ineffective to test the legality of [petitioner's] detention." 28 U.S.C. 2255(e); see In re Davenport, 147 F.3d at 609 (denying habeas relief where prisoner "had an unobstructed procedural shot at getting his sentence vacated" in his initial Section 2255 motion); see also Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir.) ("[I]t is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must never have had the opportunity to raise it by motion."), cert. denied, 540 U.S. 1051 (2003).

Second, petitioner does not identify an intervening decision of statutory interpretation in support of his argument that he was erroneously sentenced as a career offender under the mandatory Sentencing Guidelines. Petitioner instead raises (Pet. 20-22) a claim of constitutional error based on this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), which held that the ACCA's residual clause is unconstitutionally vague. Id. at 606. But even assuming Johnson applied retroactively to petitioner's classification under the Guidelines, a federal prisoner attacking his conviction on constitutional grounds following the denial of a first Section 2255 motion must satisfy the gatekeeping provisions of 28 U.S.C. 2255(h), which limits constitutional challenges in second or successive Section 2255 motions to those relying on "a new rule of constitutional law" that this Court has "made retroactive to cases on collateral review." 28 U.S.C. 2255(h)(2).

No court of appeals has construed the saving clause to permit a federal prisoner to bypass those gatekeeping limitations and instead raise a constitutional claim in a habeas petition. See, e.g., Camacho v. English, 872 F.3d 811, 813 (7th Cir. 2017) ("A petitioner who seeks to invoke the Savings Clause of § 2255(e) to proceed under § 2241 must demonstrate * * * that he relies on not a constitutional case, but a statutory-interpretation case, so that he could not have invoked it by means of a second or successive section 2255 motion.") (brackets and internal quotation marks omitted), cert denied, 138 S. Ct. 1028 (2018). The saving clause therefore does not permit a habeas petition raising a claim of Johnson error under any circuit's approach.

This Court has denied petitions for writs of certiorari in cases in which the petitioners would not have been eligible for relief even in the circuits that have taken an expansive view of the saving clause to allow some statutory challenges to a conviction or sentence. See, e.g., Gov't Br. in Opp. at 21-22, Venta v. Jarvis, 138 S. Ct. 648 (2018) (No. 17-6099); Gov't Br. in Opp. at 24-27, Young v. Ocasio, 138 S. Ct. 2673 (2018) (No. 17-7141). The Court should follow the same course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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