CASE NO. 20-5172

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

DARRELL WILLIAMS

Petitioner,

v.

JOE COAKLEY, Warden, Hazelton USP

Respondent.

On Petition for a Writ of Certiorari

To the Fourth Circuit Court of Appeals

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

Darrell Henry Williams, pro se
Reg. No. 26008-044
Springfield MCFP
P.O. Box 4000
Springfield, MO 65801-4000
(417) 862-7041
Fax: (417) 837-1717

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18 U.S.C. §924(e)(2)(B):

(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;

28 U.S.C. § 2255(e):

(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.

28 U.S.C. §2255(h):

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 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.

28 U.S.C. § 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 [28 USCS § 2255].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 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 [28 USCS § 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.

(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.

United States Sentencing Guidelines

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, 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, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

ARGUMENT

I. The Government concedes the Circuits conflict on each of the issues petitioner raises, but urges the Court to deny him review on plainly false premises.

The Government confirms the Circuits conflict on whether offenses committed with a mens rea of recklessness satisfy the "element of force" definition of "crimes of violence" in U.S.S.G. §4B1.2(a)(1) and the identical "violent felony: definition in the "Armed career Criminal Act, 18 U.S.C. §924(e)(2)(B)(i). It agrees that that this Court will decide the circuit conflict that exists on that issue in Charles Borden v. United States, No. 19-5410. As this Court's questioning in the November 3, 2020 argument showed, the Borden decision will likely address statutes precisely like the Missouri second degree assault statute, which your petitioner argues indivisibly encompasses the action of "recklessly caus[ing] serious physical injury to another person. Mo. Rev. Stat. §565.060(2) (1978). See Borden, supra, Oral Argument Transcript, p. 18 (Alito, J., questioning), pp. 18-20 (Sotomayor, J. questioning).

The Government argues this Court should take as settled the Eighth Circuit's superficial conclusion in 2018 that the Missouri second-degree assault statute divisibly defines multiple offenses, in United States v. Welch, 879 F.3d 324, 326 (8th Cir. 2018). To the contrary, the three judge panel in Welch summarily assumed the statute was divisible because it listed "elements in the alternative, and thereby define[d] multiple crimes." Id., quoting Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). The panel ruling in Welch preceded the en banc ruling in United States v. Naylor, 887 F.3d 397 (8th Cir. 2018), which actually followed the Mathis procedure of exploring Missouri state court decisions and determined that "the Supreme Court of Missouri has consistently held that disjunctive alternatives in Missouri's criminal statues should be construed as listing various ways of committing a single crime." *Id.* at 401, citing State v. Lusk, 452 S.W.2d 213, 223 (Mo. 1970). In the wake of a favorable ruling in Borden, the Fourth Circuit in

Petitioner's case could well follow the Eighth Circuit's en banc precedent to conclude that the disjunctively defined alternatives in Mo. Rev. Stat. §565.060 are indivisible and the subsection making it a crime to "recklessly cause[] serious physical injury to another person" invalidates second degree assault as a predicate crime of violence."

The government does not deny that if Borden eliminates statutes like Missouri's second degree assault law, the District Court would not have been able to sentence petitioner to more than 235 months, and could not have imposed the 310 month term petitioner is now serving. Gov. BIO 4. To date, Petitioner has already served 239 calendar months since he was sentenced to 310 months on December 1, 2010, and he had prior credit for time served amounting to 505 days (adding another 16 months for a total time served to date exceeding 255 months, not county earned good conduct credit while in prison). He has exceeded the non-career offender Guidelines range maximum of 235 months by 20 months already. His case demonstrates the alarming injustice of denying a vehicle of relief to prisoners serving unjustly inflated mandatory Sentencing Guidelines prison terms declared unconstitutional in United States v. Booker, 543 U.S. 220 (2005). The injustice is even more salient because your petitioner would have been released at least four 20 months ago had he been sentenced in 2000 without the career offender enhancement. As such, he would have been spared the COVID-19 infection he incurred at MCFP Springfield last month, an added punishment that now threatens his very mortality.

Granting certiorari in this case provides this Court the opportunity to answer the "important question of federal that . . . could determine the liberty of over 1,000 people," subjected to an improper enhancement of their mandatory statutory sentencing guideline concerning their right to relief under Johnson v. United States, 576 U.S. 591 (2015), while the slowly dwindling number of still hundreds of unlawfully sentenced defendants could see relief

from Johnson.. See Brown v. United States, 139 S. Ct. 14 (2018) (Sotomayor, J., dissenting from denial of certiorari) (mandatory sentencing Guidelines "were 'binding on judges' and carried 'the force and effect of laws,'" quoting United States v. Booker, 543 U.S. 220, 234 (2005). "That sounds like the kind of case [the Court] ought to hear." Brown, at 16. As petitioner's case demonstrates, this could also lead to a reduction in the federal prison population, enabling prisoners serving unconstitutional sentences to return to private family homes where social distancing and diligent hygiene is available, unlike federal prisons. See Lady Curtis Valentine v. Bryan Collier, No. 20A70, Order of Justice Alito denying application to vacate stay, p. (Nov. 16, 2020) (Sotomayor, J., joined by Kagan, J., dissenting from denial of application to vacate stay) (vulnerable inmates like petitioners face sever risks of serious illness and death from COVID-19, but are unable to take even the most basic precautions against the virus on their own," like social distancing and enforced mask wearing).

The Government otherwise contends the Court should exclude petitioner from any benefit from this Court further resolving the circuit split over the circumstances in which "the remedy by [28 U.S.C.§2255] motion is inadequate or ineffective" as a vehicle for a defendant to seek release from an unconstitutional sentence imposed in violation of Federal law. Gov. BIO 13-15. The Government stresses instances in which this Court previously declined to decide the issue, id. at 13, yet provides no answer to the growing need to do so in light of the Eighth Circuit's aggravation of the circuit conflict by delegating the gate-keeping function Congress assigned the judiciary in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 28 U.S.C. §2244(b) and 2255(h), to the Department of Justice—the very executive entity whose excesses and omissions habeas corpus and §2255 were intended to provide a check against. See Petition for Certiorari, pages 23-24. The Government does not deny that the Eighth Circuit's

standards making the federal prosecutor's consent the premier consideration for granting a prisoner leave to file a second or successive petition destroys the separation of powers for which habeas corpus exists to enforce. The Eighth Circuit's procedure in delegating the decision of which prisoners received permission to file second or successive §2255 petitions to the federal prosecutor whose charging decision is challenged violates that separation of power. As this Court explained in Hamdi v. Rumsfeld, 542 U.S. 507, 536-37 (2004):

> "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge."

The Government's claim that §2255 did not constitute an inadequate or ineffective vehicle by which petitioner could claim that Missouri's reckless assault statute did not satisfy the "element of force" definition for "crimes of violence" in U.S.S.G. §4B1.2(a)(1) misconstrues the legal landscape at the time of petitioner's conviction, direct appeal and first §2255 petition. Gov. BIO 14-15. The Government falsely claims that legal precedents did not foreclose his ability to challenge his inflated mandatory career offender sentencing range based on an assault statute satisfied by reckless conduct at the time of his December 2000 sentencing, his direct appeal, or his initial §2255 petition, which was denied in 2006. The "residual clause" definition provided an automatic qualification of reckless assaults on the basis that they "involve conduct creating a substantial risk of serious physical injury of another," by which courts could avoid the "element of force" analysis. Compare Taylor v. United States, 495 U.S. 575, 600 & n.9 (1990) ("The Government remains free to argue that any offense – including offenses similar to generic burglary – should count towards enhancement as one that 'otherwise involve conduct that presents a serious potential risk of physical injury to another' under §924(e)(2)(B)(ii)," emphasis added). Moreover, longstanding Eighth Circuit precedent declared that Sentencing Guidelines

were not subject to a challenge that they were void for vagueness, see United States v. Wivell, 893 F.2d 156 (8th Cir. 1990). The Government simply ignores this salient circumstance in claiming that petitioner was free to raise a vagueness challenge of the kind raised in Johnson v. United States 576 U.S. 591 (2016). The government's reliance on the Eighth Circuit's 2011 decision in United States v. Ossana, 638 F.3d 895 (2011), is also entirely misplaced here. Gov. BIO 14. The Eighth Circuit in Ossana relied not on Leocal v. Ashcroft, 543 U.S. 1 (2004), but on this Court's 2008 decision in Begay v. United States, 553 U.S. 137 (2008), rejecting drunk driving as an offense that "involves conduct that presents a serious potential risk of physical injury to another" in the residual clause of ACCA, a definition identical to the residual clause in U.S.S.G. § 4B1.2(a)(2). The Begay decision was decided long after Mr. Williams' timely first §2255 petition had been denied in the district court, a denial the Eighth Circuit summarily affirmed in 2006, Williams v. United States, 2006 U.S. Dist. LEXIS 46100 (8th Cir. 2006). The Ossana decision shows that until Begay the Eighth Circuit would not have entertained any challenge that a crime satisfied by a reckless mens rea failed to qualify as a crime of violence if the conduct involved a substantial risk of injury to the person of another. See, e.g., United States v. McCall, 439 F.3d 967, 971-72 (8th Cir. 2006) (upholding driving under the influence as a violent felony under the residual clause definition).

In sum, the actual legal landscape refutes the Government's claim that §2255 provided an unobstructed opportunity to argue that the career offender guideline that mandated an inflated sentencing range of 262-327 months was erroneous on the theory that reckless assault did not constitute a crime of violence under section 4B1.2. Although the Eighth Circuit added grievous insult to injury by delegating to the Department of Justice to decide his eligibility to file a second or successive §2255 petition raising the new constitutional rule in Johnson, he should not be

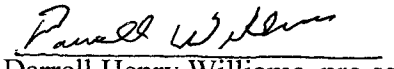
further denied the opportunity to raise a challenge based on a favorable statutory construction ruling in Borden. But for the Eighth Circuit's improper gatekeeping standards, petitioner may well have already been released by striking down the invalid career offender range that literally dictated his sentencing range (again, contrary to the Constitution in the form of the Sixth Amendment), and would not have been caged in the federal prison when it became infested with COVID-19 last month.

At the very least, the importance of these issues generally and their potential impact on petitioner's mortality, warrant holding his petition for certiorari until this Court issues its decision in Borden this Term.

CONCLUSION

WHEREFORE, petitioner respectfully prays that this Court grant his petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals, or hold the petition for ruling upon this Court's ruling this Term in Borden v. United States.

Respectfully submitted,



Darrell Henry Williams, pro se
Reg. No. 26008-044
MCFP Springfield
Box 4000
Springfield, MO 65801
(618) 964-1441