No. _____

IN THE
Supreme Court of the United States

BRANDON LEE MOJICA,
Petitioner,
v.

UNITED STATES OF AMERICA.
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Court should grant, vacate, and remand this case to the Eleventh Circuit for reconsideration in light of *United States v. Davis*, 2019 WL 2570623 (2019).

2. Does a defendant have to plead at a heightened standard and prove his allegations before being granted an evidentiary hearing under 28 U.S.C. § 2255.

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PETITION FOR A WRIT OF CERTIORARI

Brandon Lee Mojica respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals, App. 1, is unreported. The opinion of the district court, App. 2-13, is unreported.

JURISDICTION

The order of the court of appeals denying Mojica a certificate of appealability ("COA") was entered April 3, 2019. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C. § 924(c)(3) provides that:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or

> property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

Title 28, U.S.C. § 2255(b), states in relevant part:

> 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.

28 U.S.C. § 2255(b).

STATEMENT OF THE CASE

Brandon Lee Mojica was charged with aiding and abetting bank robbery and aiding and abetting the brandishing of a firearm during and in relation to a crime of violence. App. 2. Mojica pleaded guilty to both charges pursuant to a plea agreement. App. 3. During Mojica's plea colloquy, the United States specifically advised the district court that Mojica's guilt on both counts rested on a theory of aiding and abetting liability. App. 14-15.

Mojica subsequently moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. App. 2. Mojica raised three claims in his § 2255 motion. App. 6, 11.

Mojica argued in his first ground for § 2255 relief that his attorney was ineffective for failing to file a motion to suppress his confession. App. 6. Mojica asserted that he "twice asked for attorney" before being interrogated by police after his arrest. App. 6. In response, police allegedly told Mojica that "innocent people don't need lawyers." App. 6. Mojica then proceeded to confess to his involvement in the bank robbery. App. 6.

Mojica claimed that he told his counsel about the circumstances surrounding his confession, but his attorney never explained to him "that moving for suppression of his confession was an option." App. 6. Mojica asserted that there was a reasonable probability he would not have pleaded guilty and proceeded to trial had a motion to suppress been presented because it was likely the district court would have granted the suppression motion had it been presented. App. 6.

Mojica asserted in claim two that his plea to the firearm charge was not knowing and voluntary because aiding and abetting bank robbery is not a proper predicate under 18 U.S.C. § 924(c)(3)(B) in light of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). App. 11. Relatedly, Mojica contended in claim three that his firearm conviction was unconstitutional in light of *Dimaya*. App. 11.

The district court denied Mojica's § 2255 motion without an evidentiary hearing. App. 2-13.

According to the district court, Mojica's claim that his attorney never advised him that moving for suppression of his confession "was an option" was "belied by the record" because of Mojica's statements

during his plea colloquy. App. 9. Specifically, the district court cited to Mojica's stated satisfaction with his counsel's representation during the plea colloquy, and failure to "indicate that he had concerns about his confession" at that time. App. 9.

The district court also found that Mojica had made "no showing of prejudice" because Mojica's co-defendant implicated Mojica during his confession. App. 10. In so holding, the district court—without holding an evidentiary hearing—disregarded a statement by Rodriguez which was included with Mojica's § 2255 motion which stated "that he implicated Petitioner in the crimes because the agent interrogating him had told him to do so." App. 10 n.4.

Notably, the Government did not offer a declaration or other evidence from police refuting Mojica's claims. The Government also did not provide the district court with a declaration or affidavit from Mojica's former counsel contesting Mojica's allegations.

Finally, the district court rejected Mojica's challenge to his firearm conviction citing to Eleventh Circuit precedent that treats armed bank robbery as "a predicate crime of violence under § 924(c)(3)(A)." App. 11. The district court also held that § 924(c)(3)(B) was not unconstitutionally vague. App. 11.

The district court denied a certificate of appealability ("COA"). App. 12-13.

Mojica appealed the denial of his § 2255 motion to the Eleventh Circuit, renewing his request for a COA. In a perfunctory, one page order, the Eleventh Circuit denied Mojica's request for a COA "because he cannot make a substantial showing of the denial of a constitutional right." App. 1.

REASONS FOR GRANTING THE PETITION

I. The Court Should Issue a GVR So the Eleventh Circuit May Consider the Effect of *Davis* on Mojica's § 2255 Firearm Claims

"A GVR is appropriate when 'intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (internal citations omitted).

In rejecting Mojica's challenge to his firearm conviction, the district court relied in part upon Eleventh Circuit precedent holding that § 924(c)(3)(B) is not unconstitutionally vague. App. 11. But that precendent is no longer good law in light of *United States v. Davis*, 2019 WL 2570623 (2019). Thus, this Court's recent *Davis* decision represents an "intervening development" that reveals a reasonable probability the Eleventh Circuit would have decided Mojica's appeal differently had *Davis* been the law when Mojica's appeal was decided. *Wellons*, 558 U.S. at 225.

Moreover, although this case arises in the posture of a § 2255 motion, the Court's decision in *Welch v. United States* strongly suggests that the *Davis* rule, like *Johnson v. United States*, 135 S.Ct. 2551 (2015), is retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257 (2016). A GVR will allow the Eleventh Circuit the opportunity to resolve this question in the first instance.

While the United States might argue that a GVR is unnecessary because Mojica's aiding and abetting armed bank robbery conviction qualifies under § 924(c)(3)(A), the Eleventh Circuit has never specifically addressed this question—as applied to armed bank robbery. And as Circuit Judge Martin noted in dissent in *In re Colon*:

> It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the "elements clause" definition. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's crime. *See Rosemond v. United States*, —— U.S. ——, 134 S.Ct. 1240, 1246–47, 188 L.Ed.2d 248 (2014) ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor *without proof that he participated in each and every element* of the offense. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one (or some) of a

> crime's phases or elements." (quotation and citations omitted) (emphasis added)). Even when a principal's crime involves an element of force, there is "no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather, ... courts have *never thought relevant the importance of the aid rendered*." *Id.* at 1247.

In re Colon, 826 F.3d 1301, 1306-07 (11th Cir. 2016) (emphasis in original).

In light of the above, it is debtable among jurists of reason whether Mojica is entitled to § 2255 relief. *Buck v. Davis*, 137 S.Ct. 759, 777 (2017). Accordingly, the Court should GVR this case so the Eleventh Circuit may decide the impact of *Davis* on Mojica's § 2255 firearm challenges.

II. The Court Should Grant Certiorari to Resolve a Growing Split Among the Lower Courts About What a § 2255 Movant Must Allege to Receive an Evidentiary Hearing

Title 28 U.S.C. § 2255(b) states, in relevant part, that district courts must "grant a prompt hearing" on a § 2255 motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b) (alterations added).

This Court has long recognized that when a federal prisoner alleges facts that, if proven, would entitle him to relief from an unconstitutional conviction or sentence, the district court is required to grant a hearing to "determine the issue and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case

conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). In *Machibroda v. United States*, 368 U.S. 487, 494–95 (1962), for instance, the Court explained that the relevant "files and records" relate only to proceedings before the district court, not to "occurrences outside the courtroom" or to circumstances that are not "of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection." *Id.* at 495. Moreover, in determining whether dismissal is appropriate, a district court is not permitted to make findings on controverted issues of fact without a hearing, *United States v. Hayman*, 342 U.S. 205, 219–20 (1952), or to judge ex parte the plausibility of a petitioner's allegations, *Walker v. Johnston*, 312 U.S. 275, 287 (1941).

Notwithstanding this Court's precedents, a growing number of lower courts now require § 2255 movants to do more than what is required by § 2255 to obtain an evidentiary hearing. Mojica's case is an excellent example.

The district court, for example, held that "a defendant must support his allegations with at least a proffer of some credible supporting evidence" before being granted an evidentiary hearing. App. 3. The district court then proceeded to characterize Mojica's allegation that his attorney failed to advise him that moving to suppress his confession "was an option" as "belied by the record" because Mojica said he was satisfied with his lawyer when he pleaded guilty and Mojica "said nothing during the plea hearing to indicate that he had concerns about his confession." App. 9.

However, Mojica's statements during his plea hearing do not "conclusively show," 28 U.S.C. § 2255(b), that Mojica's attorney advised him that a motion to suppress "was an option." Nor do Mojica's claims of satisfaction with his counsel at the time he entered his plea "conclusively show" that Mojica's counsel did not render deficient performance. Likewise, Mojica's failure to alert the district court to the problems with his confession during his plea does not "conclusively show" that Mojica ignored problems with his confession. In fact, Mojica's statements during his plea hearing do not "conclusively show" that Mojica was even *aware*—at that time—that a motion to suppress "was an option."

Similarly, the record does not "conclusively show" that Mojica would not have proceeded to trial had his confession been suppressed. Mojica's co-defendant's repudiated confession, App. 10 n.4, does not conclusively show that Mojica was incapable of demonstrating prejudice.

The district court's errors in deciding whether to grant an evidentiary hearing are further compounded by the total absence of *any* opposing affidavits or declarations from police refuting Mojica's claims about his confession. Also, no declaration or affidavit was provided by Mojica's former counsel refuting Mojica's allegations.

As discussed, the Eleventh Circuit's implicit adoption of the district court's heightened standard for granting a § 2255 evidentiary hearing is a growing trend among the lower courts. In the Fourth Circuit, for example, a defendant must demonstrate "extraordinary circumstances" before being granted an evidentiary hearing based on claims that are

inconsistent with a defendant's sworn statements during a guilty plea hearing. *United States v. Lemaster*, 403 F.3d 216, 221-222 (4th Cir. 2005). The Fifth Circuit in a prior case required a defendant to "me[e]t his burden of showing prejudice" before being granted an evidentiary hearing, as opposed to whether the record "conclusively show[ed]," 28 U.S.C. § 2255(b), the defendant was not entitled to relief. *United States v. Patterson*, 739 F.2d 191, 195 (5th Cir. 1984) *see also United States v. Kayode*, 777 F.3d 719, 730-32 (5th Cir. 2014) (Dennis, J., dissenting); *but see United States v. Weeks*, 653 F.3d 1188, 1200-06 (10th Cir. 2011) (remanding for an evidentiary hearing despite statements during plea colloquy).

Indeed, it appears that the Eleventh Circuit's tacit approval of the district court's denial of an evidentiary in Mojica's case is itself inconsistent with the Eleventh Circuit's own precedents. *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) ("[t]he law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only allege—not prove—reasonably specific, non-conclusory facts that, if true, would entitle him to relief. If the allegations are not affirmatively contradicted by the record and the claims are not patently frivolous, the district court is required to hold an evidentiary hearing. It is in such a hearing that the petitioner must offer proof").

Thousands of defendants apply for 28 U.S.C. § 2255 relief each year. It has been nearly 40 years since this Court has accepted review in a case to decide whether the lower courts remain faithful to the statutory directive that an evidentiary hearing must be granted on a § 2255 motion "[u]nless the motion and the files

and records of the case *conclusively show* that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b) (alterations and emphasis added).

Mojica's case presents an excellent opportunity for the Court to resolve the split among the lowers on this important area of the law, and to help provide guidance to lower courts on what § 2255 movants must do to obtain an evidentiary hearing. Accordingly, the Court should grant certiorari to resolve this question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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