JUDGE DAVID BRIONES

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS



UNITED STATES OF AMERICA,

*Plaintiff*,

v.

IVAN OCON,

*Defendant.*

Case No. 3:06-CR-01078-DB-2

EP21CV0283

IVAN OCON,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

Case No. 3:21-CV-_____

**PETITION FOR WRITS OF AUDITA QUERELA AND CORAM NOBIS**

TO THE HON. DAVID BRIONES, SENIOR UNITED STATES DISTRICT JUDGE:

COMES NOW Petitioner, IVAN OCON, in the above-entitled and captioned cause and submits this Petition for Writs of Audita Querela and Coram Nobis as follows:

**PRELIMINARY STATEMENT**

1. Petitioner Ivan Ocon served faithfully in the U.S. Army from 1997 to 2003. After his first enlistment, he re-enlisted twice more and deployed multiple times, including to protect the King of Jordan during Operation Iraqi Freedom. Mr. Ocon struggled with post-traumatic stress stemming from an incident in Jordan in which he believed he would die. Upon returning to the United States in 2003, Mr. Ocon suffered from insomnia and depression and struggled to adjust to

civilian life. Despite his service-related mental health conditions, Mr. Ocon worked to financially support his daughter, a United States citizen born in 2003.

2. In 2006, Mr. Ocon was arrested for his role in a kidnapping that stemmed from a drug transaction gone awry. In 2007, Mr. Ocon agreed to cooperate with the prosecution, accepted responsibility for his actions, and pled guilty to using a weapon in furtherance of the kidnapping, which at the time constituted a "crime of violence" and was a necessary predicate for the weapons charge. This Court sentenced him to ten years in federal prison, which was reduced by one year for good behavior. At the completion of his sentence. Mr. Ocon was deported to Mexico.

3. Mr. Ocon entered Mexico in 2016 with a small bag of clothes and $500. He did not know anyone and lived an isolated life, fearing for his safety. He watched the lives of his family, including his daughter, and friends unfold over social media.

4. Despite these challenges, Mr. Ocon became a devoted advocate for deported veterans and now serves as a Director of the Deported Veterans Support House. He has made many contributions to his community in Juarez, Mexico, volunteering with service organizations, the Joint Military Assistance Command, and a nursing home.

5. After Mr. Ocon's 2016 deportation, the Supreme Court invalidated a portion of the statute defining "crime of violence." Numerous lower courts have subsequently concluded that kidnapping does not constitute a "crime of violence" under this precedent. Because kidnapping is no longer a crime of violence, therefore, Mr. Ocon's 2007 conviction for use of a weapon in *furtherance* of a crime of violence is no longer considered valid.

6. In September 2021, Mr. Ocon applied for military naturalization, for which he must demonstrate that he is of good moral character. The immigration statutes provide that certain criminal convictions constituting a "crime of violence" permanently bar one from meeting this requirement. Mr. Ocon's kidnapping conviction is not a crime of violence—and therefore not a

bar—but the naturalization adjudicators (who may look only to the fact of a conviction and not its underlying validity) may nevertheless conclude that the weapons conviction remains a bar.

7. Mr. Ocon petitions this Court to issue a writ of audita querela or coram nobis to vacate his weapons charge as invalid under current law, so as to remove the last potential obstacle to his return home to his family in the United States—the country he served faithfully—as a citizen.

**PARTIES**

8. Petitioner Ivan Ocon is a veteran who currently resides in Juarez, Mexico. He was convicted in this Court for Aiding and Abetting a Kidnapping under 18 U.S.C. § 1201 and the accompanying firearms charge, Using, Carrying, or Brandishing a Firearm in Furtherance of a Crime of Violence under 18 U.S.C. § 924(c). *See* Judgment, *United States v. Ocon*, 3:06-cr-01078-DB (W.D.Tex. Sept. 25, 2007).

9. Respondent is the United States of America. Service is being made on Stephen G. Garcia, Assistant U.S. Attorney, 700 E. San Antonio Street, Suite 200, El Paso, TX 79901, attorney of record for Respondent.

**JURISDICTION**

10. This case arises under the Fifth Amendment to the United States Constitution and federal common law. The Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1331. This Court has the authority pursuant to 28 U.S.C. § 1651(a) and federal common law to grant writs of audita querela and coram nobis.

**VENUE**

11. Venue is proper in the Western District of Texas because a substantial part of the events and omissions giving rise to these claims occurred and continue to occur in this district, where Mr. Ocon was charged and convicted before this Court. 28 U.S.C. § 1391(b).

12. The writs of audita querela and coram nobis normally must be sought in the trial court which rendered the judgment.

## FACTS

### A. Petitioner Ivan Ocon

13. Mr. Ocon was born in Mexico in 1977 and came to the United States in 1984, when he was seven years old. Mr. Ocon entered lawfully and remained in the United States as a permanent resident. He grew up in Las Cruces, New Mexico, where he began public school at Loma Heights Elementary School before graduating from Oñata High School.

14. Hoping to give back to the country he considered his home, Mr. Ocon enlisted in the Army in 1997. After basic training at Fort Knox, he traveled to Maryland and learned to be a diesel power mechanic.

15. In Mr. Ocon's first enlistment, he was stationed at Fort Lewis, Washington with the 542nd Maintenance Company. He then studied land-based military operations in Japan, and was subsequently stationed in Korea with the 2nd Infantry Division. He re-enlisted in 1999 and was stationed at Fort Irwin, California with the 11th Armored Cavalry Regiment-Blackhorse. In his third enlistment in 2002, he was assigned to the 108th Air Defense Artillery Brigade.

16. In 2003, Mr. Ocon was deployed to Jordan as part of Operation Iraqi Freedom, during which he was assigned to personally protect the King of Jordan. Mr. Ocon experienced a traumatic event during that deployment. When Mr. Ocon was briefly gone from his post, his Jordanian escort vanished, and a tractor-trailer rammed his vehicle, causing him to believe he would die in an attack.

17. Mr. Ocon returned to the United States in 2003 and was present at the birth of his daughter, Alyzza Merae Ocon, a U.S. citizen.

18. Mr. Ocon started to experience post-traumatic stress from the attack in Jordan around that time; he suffered insomnia and depression. He self-medicated with marijuana and cocaine to manage his symptoms of post-traumatic stress, insomnia, and depression.

19. After the Army detected his drug use during a random test, in December 2003 Mr. Ocon left the Army with a general discharge under honorable conditions. He satisfactorily completed all disciplinary requirements arising from the test.

20. Outside of the Army, Mr. Ocon continued to experience traumatic stress and struggled to adjust to civilian life. He worked construction and furniture delivery jobs at less than minimum wage.

21. In 2006, Mr. Ocon was charged with kidnapping and brandishing a firearm in furtherance of a crime of violence. These charges stemmed from a difficult situation in which Mr. Ocon's brother was robbed at gunpoint. After he had been robbed, Mr. Ocon's brother took a person staying at the home of those who conducted the robbery at gunpoint. Falsely believing that the victim was connected with the robbery, Mr. Ocon and others facilitated the kidnapping. Mr. Ocon communicated over the phone with individuals who were seeking to get the person back from Mr. Ocon's brother.

22. Mr. Ocon's involvement was a grave mistake that he regrets deeply, one he made while struggling with ongoing mental health effects of his service. In an attempt to begin to rectify his mistake, Mr. Ocon cooperated with law enforcement and agreed to testify as a government witness.

23. In 2007, Mr. Ocon pled guilty to "[k]idnapping, and aiding and abetting a kidnapping" under 18 U.S.C. § 1201. Mr. Ocon also pled guilty to an accompanying firearms charge, "Using, Carrying, and Brandishing a Firearm During and In Relation To, and Possessing

and Brandishing in Furtherance of a Crime of Violence" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(c)(1)(A).

24. The prosecution recognized that Mr. Ocon fully cooperated with law enforcement during the investigation of the relevant events, and recommended a sentence that was substantially lower than that contemplated by sentencing guidelines.

25. Mr. Ocon served nine years in federal prisons in Colorado and Texas. His sentence was reduced by one year for good behavior. Upon completing his sentence, Mr. Ocon was placed in removal proceedings and deported to Mexico on February 1, 2016.

## JUDICIAL AUTHORITY TO ISSUE THE WRIT OF AUDITA QUERELA AND CORAM NOBIS

26. Pursuant to 28 U.S.C. § 1651(a), the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," including writs of audita querela and coram nobis.

27. A writ of audita querela may be used to challenge the continued validity of a judgment that was correct at the time it was rendered but which is rendered infirm by matters which arise later.

28. A writ of coram nobis may be used to attack a conviction that was infirm at the time of judgment.

29. Writs of audita querela and coram nobis are available only if no other avenue of post-conviction relief exists. Because Mr. Ocon has completed his sentence and is no longer in custody, he is unable to pursue relief pursuant to 28 U.S.C. § 2255.

30. A conviction may be vacated on audita querela where the writ raises an objection not cognizable under federal post-conviction remedies.

## LEGAL CLAIMS

### CAUSE OF ACTION
### VIOLATION OF FIFTH AMENDMENT

31. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

32. The prohibition of vagueness in criminal statutes is an "essential" component of due process. The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes. *Johnson v. United States*, 576 U.S. 591, 595 (2015)

33. Under recent Supreme Court decisions addressing the definition of a "crime of violence," kidnapping under 18 U.S.C. § 1201 is not a "crime of violence." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018); *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019).

34. *Sessions* struck down the residual clause in the INA, 138 S. Ct. at 1223, and subsequently, *Davis* struck down the same residual clause in the Armed Career Criminal Act (ACCA), 139 S. Ct. at 2324.

35. After the *Sessions* and *Davis* rulings, the elements clause (§16(a)) is the remaining statutory definition of a "crime of violence." *Davis*, 139 S. Ct. at 2336; *see also United States v. Dixon*, 799 Fed. Appx. 308, 309 (5th Cir. 2020) (unpublished). For kidnapping to qualify as a crime of violence, it must qualify as a crime of violence under the elements clause.

36. Kidnapping is not a a crime of violence because it may be committed without physical force.

37. Courts use a "categorical approach" to determine whether an offense is a crime of violence under the elements clause. In the elements-clause context, that method "requires asking whether the least culpable conduct covered by the statute at issue nevertheless has as an element

the use, attempted use, or threatened use of physical force against the person of another." *Stokeling v. United States*, 139 S. Ct. 544, 556 (2019) (internal quotation marks omitted); *see also United States v. Brazier*, 933 F.3d 796, 800–01 (7th Cir. 2019).

38. Multiple circuit courts have held that because kidnapping may be committed without violence, it is not a a crime of violence under the elements clause. *United States v. Walker*, 934 F.3d 375, 379 (4th Cir. 2019); *Knight v. Walker*, 936 F.3d 495 (6th Cir. 2019); *Brazier*, 933 F.3d at 800–01.

39. Rather, "kidnapping may be accomplished without force, by 'inveigling' or 'decoying' a person without a threat of force, and by holding the person simply by locking him or her in a room, again without threat of violence." *Brazier*, 933 F.3d at 800–01 (internal quotation omitted).

40. Because a kidnapping is not a crime of violence, and committing a crime of violence is a prerequisite to a conviction for using a firearm while committing a crime of violence under the ACCA, Mr. Ocon's § 924(c)(1)(A) conviction is no longer considered valid. *Dixon*, 799 Fed. Appx. at 309 ("[F]ollowing *Davis*, [a] Section 924(c) conviction can be sustained only if [the] kidnapping offense qualifies as a crime of violence under the elements clause."); *see also Bufkin*, 800 Fed. Appx. at 438–39 ("In light of *Davis*, it is clear that using a firearm to kidnap a victim does not violate 18 U.S.C. § 924(c)(3)(B)."); *Knight*, 936 F.3d at 497 ("The government concedes that under *Davis* kidnapping in violation of 18 U.S.C. § 1201(a) is not a 'crime of violence' and thus Knight's conviction under § 924(c) for using a firearm during and in relation to kidnapping must be vacated . . . We agree.").

41. The Supreme Court opinions in *Sessions* and *Davis*, and their subsequent application to hold that kidnapping is not a "crime of violence," render Mr. Ocon's conviction under § 924(c) invalid. All of these decisions were renderedafter Mr. Ocon completed his sentence

and as deported. A writ of audita querela or coram nobis should therefore issue to vacate his § 924(c) conviction and facilitate the Army veteran's return to his family and community in the United States.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner Ivan Ocon respectfully requests that the Court:

a) Issue a Writ of Audita Querela or a Writ of Coram Nobis granting relief vacating his conviction for using, carrying, and brandishing a weapon in course of a crime of violence; and

b) Grant such other and further relief as is just and proper.

Dated: November 12, 2021

Respectfully submitted,

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