No. 18-7449

In the

Supreme Court of the United States

JOEL DARNELL PATTON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

REPLY TO BRIEF IN OPPOSITION

J. MATTHEW WRIGHT
* *COUNSEL OF RECORD FOR MR. PATTON*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
MATTHEW_WRIGHT@FD.ORG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY TO BRIEF IN OPPOSITION

The decision below perpetuates an acknowledged and entrenched circuit split about a district court's authority to correct a quickly identified mistake in its reasoning in a post-conviction proceeding. The Fifth Circuit has also dramatically raised the stakes for habeas petitioners and 28 U.S.C. § 2255 movants—many of whom are pro se—who identify such an error immediately after the judgment. Should they file a motion calling attention to the court's error? Guess wrong, and they could forever lose their right to appeal the adverse judgment. Nothing in the federal rules or this Court's precedent supports such an unfair and illogical approach. This case presents the question in stark, outcome-determinative terms. The Court should grant certiorari.

1. Respondent acknowledges "disagreement" among the lower courts about the first question presented. U.S. Br. 10, 15. According to the Fifth Circuit's exceedingly technical, post-hoc analysis, the district court had no authority to grant Petitioner's post-judgment motion to reopen because (unbeknownst to Petitioner, Respondent, and the district court) the motion was (in reality) an unauthorized, successive motion to vacate. Pet. App. 5a–8a. Based on the Fifth Circuit's reclassification, the court concluded (contrary to Fed. R. App. P. 4(a)(4)) that the post-judgment motion did not suspend finality or otherwise extend Mr. Patton's deadline to appeal the original judgment. Pet. App. 8a–9a.

That would not happen in the Third, Sixth, Seventh, or Ninth Circuits. *See* U.S. Br. 14–16 (discussing *Blystone v. Horn*, 664 .3d 397 (3d Cir. 2011); *Howard v. United States*, 533 F.3d 472 (6th Cir. 2008); *Curry v. United States*, 307 F.3d 664 (7th

Cir. 2002), and *Rishor v. Ferguson*, 822 F.3d 482 (9th Cir. 2016)). In each of those circuits, a prisoner may seek timely reconsideration of an order dismissing or denying post-conviction relief (and the district court retains authority to reconsider its own decision) without affecting the prisoner's right to *appeal* the underlying judgment. But in the Fifth Circuit, there is always a risk that the appellate court will later decide that the reconsideration motion was an unauthorized successive petition, and did not extend the deadline to appeal. The law of federal jurisdiction should be uniform. The only way to make it so on this issue is to grant certiorari.

2. Even though Petitioner was released from prison on September 18, 2018, U.S. Br. 17, the case is not moot. Petitioner has identified an injury that the courts can redress: he was convicted of the ACCA-enhanced version of 18 U.S.C. § 922(g). *See* 5th Cir. R. 286 (reflecting conviction under "18 U.S.C. §§ 922(g)(1), 924(e)(1)"). As long as that enhancement remains in place, the district court can "extend" Petitioner's "term of supervised release" up to five years. 18 U.S.C. § 3583(b)(1), (e)(2). Similarly, if the district court revokes Petitioner's supervised release, the ACCA enhancement exposes him to a five-year term of imprisonment. 18 U.S.C. § 3583(e)(3).

If Petitioner prevails, he stands to benefit in three ways. First, eliminating the ACCA enhancement will limit his supervised release to three years and will limit any revocation sentence to two years. 18 U.S.C. § 3583(b)(2), (e)(3). Second, the federal sentencing "statutory structure" provides an array of remedies "to address" the weighty inequities that arise when a prisoner "is incarcerated beyond the expiration

of his prison term." (*Roy Lee) Johnson v. United States*, 529 U.S. 53, 60 (2000). Those remedies include a discretionary shortening of supervised release, or a relaxed set of conditions. "[T]he possibility that the district court may alter [the defendant's] period of supervised release pursuant to 18 U.S.C. § 3583(e)(2), if it determines that he has served excess prison time, prevents [a post-conviction] petition from being moot." *(Frank Wayne) Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006); *accord Mujahid v. Daniels*, 413 F.3d 991, 994–995 (9th Cir. 2005) (same). Third, if the district court vacates the ACCA-enhanced sentence and re-sentences Petitioner to ten (or fewer) years, the Bureau of Prisons will credit the excess time Petitioner served in custody against any future revocation sentence. *See* Bureau of Prisons Designation and Sentence Computation Manual, Policy Statement 5880.28, at page 1-14D ("If a prisoner is released late ('past due') because of staff error, a court order or executive clemency and is later returned as a supervised release or probation violator, the late release time shall be awarded on the supervised release or probation violator term."); *accord* 18 U.S.C. § 3585(b).

If nothing else, Petitioner could ask the district court to reform its criminal judgment to delete the reference to ACCA. Because a criminal judgment is a permanent court record with collateral consequences, an "error in the judgment is neither harmless nor moot." *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017). This Court has granted relief to numerous petitioners who sought to delete an erroneous statutory sentencing enhancement in their judgments, even after they were released and likely deported. *See, e.g.*, *Perez-Jimenez v. United States*, 138 S.

Ct. 1978 (BOP release July 3, 2017; cert. granted May 14, 2018); *Perdomo v. United States*, 138 S. Ct. 1976 (BOP release Jan. 23, 2018; cert. granted May 14, 2018); *Aguirre-Arellano v. United States*, 138 S. Ct. 1978 (BOP release Feb. 6, 2018, cert. granted May 14, 2018); *Linares-Mazariego v. United States*, 138 S. Ct. 1980 (BOP release April 6, 2018, cert. granted May 14, 2018).

3. If Petitioner's release from imprisonment killed the case or controversy, this Court should still grant the Petition, vacate the Fifth Circuit's decision, and remand "with instructions to direct the District Court to dismiss the" § 2255 claim "as moot." *Azar v. Garza*, 138 S. Ct. 1790, 1793, (2018). "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). "When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.*; *accord Alvarez v. Smith*, 558 U.S. 87, 97 (2009) (Equitable vacatur is the "ordinary practice" when a civil action becomes moot on appeal.).

Respondent had a hand in the delay. Back in November of 2017, Petitioner sought emergency or expedited consideration of his request for a certificate of appealability in the Fifth Circuit. The Government *opposed* Petitioner's request for expedited consideration. *See* U.S. Resp. to Emerg. Mot. for COA (filed Nov. 16, 2017). That response contained no suggestion that the appeal was untimely, and did not mention *Gonzalez v. Crosby*, 545 U.S. 524 (2005). Instead, Respondent noted that

there was already a "heap" of cases at the Fifth Circuit awaiting a ruling on whether Texas robbery remained a violent felony, and urged the Fifth Circuit not to "mov[e] Patton's case to the top of the heap" by granting an expedited COA. U.S. Resp. to Emerg. Mot. for COA 4. The Fifth Circuit did not grant the COA until May of 2018. Respondent's opposition to expedited treatment (and its failure to raise or discuss the issue the timeliness/jurisdictional issue) delayed the ultimate decision in the court below. Equitable vacatur would therefore be appropriate if the case were moot.

4. Respondent argues that it would ultimately prevail "on the merits" because, in its view, Texas simple robbery satisfies ACCA's elements clause. U.S. Br. 16–17. This argument is wrong, but more importantly, it is beside the point. The Fifth Circuit refused to consider Petitioner's elements-clause arguments because, in its view, his notice of appeal was untimely. Pet. App. 9a. This Court should correct the Fifth Circuit's jurisdictional error and remand for a true decision on the merits.

a. Texas defines robbery much more broadly than other states. Most states utilize the common-law definition of robbery, which requires proof that the defendant took property *from the presence* of a victim *by means of* force or threat. The common-law definition "necessarily involves a physical confrontation and struggle" between the robber and the victim. *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019). But Texas "does not define 'robbery' in terms of the use or threat of force." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 (5th Cir. 2006). In Texas, a thief becomes a robber if he "(1) intentionally, knowingly, or recklessly causes bodily

injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Texas Penal Code § 29.02(a).

b. A defendant can thus commit Texas robbery without ever *interacting* with the victim. *Howard v. State*, 333 S.W.3d 137, 138–139 (Tex. Crim. App. 2011) (affirming aggravated robbery conviction where the victim observed the defendant through a video monitor from a different room). If a would-be shoplifter recklessly causes another person to suffer "bodily injury," even during the flight, he becomes is a robber in Texas. The same is true of a shoplifter who shouts, "I have AIDS" at a store employee trying to detain him. *See Martin v. State*, No. 03-16-198-CR, 2017 WL 5985059 (Tex. App.—Austin Dec. 1, 2017, no pet.). It is far from clear that either of these situations involves a use or threatened use of physical force under ACCA.

c. Historically, the Fifth Circuit classified Texas robbery as categorically violent under the residual clause. *See United States v. Gore*, 636 F.3d 728, 744 (5th Cir. 2011) (Higginbotham, J., concurring) (The Fifth Circuit "previously concluded that, as defined by Texas law, both robbery and aggravated robbery are violent felonies under the Residual Clause."); *United States v. Davis*, 487 F.3d 282, 286–287 (5th Cir. 2007) (holding that Texas simple robbery satisfies ACCA's residual clause). The Fifth Circuit has also stated previously that Texas robbery would not satisfy the elements clause. *Santiesteban-Hernandez*, 469 F.3d at 379–381 & n.3.

d. The proper analysis of Texas robbery is a matter of ongoing dispute in the lower court. District and Circuit judges in the Fifth Circuit judges have

occupied every possible position on the merits. *See e.g. United States v. Fennell*, 695 F. App'x 780 (5th Cir. 2017) (affirming a decision that Texas simple robbery is not an elements-clause violent felony); *United States v. Burris*, 896 F.3d 320 (5th Cir.) (holding that Texas robbery is not a violent felony under ACCA's elements clause), *withdrawn*, 908 F.3d 152 (5th Cir. 2018), *on reh'g*, 920 F.3d 942 (5th Cir. 2019) (holding that Texas robbery is a violent felony under the elements clause), *pet. for reh'g en banc filed* (May 1, 2019); *United States v. Wheeler*, 733 F. App'x 221 (5th Cir. 2018) (holding that Texas robbery is not a violent felony under ACCA's elements clause and it is "unclear" whether Texas aggravated robbery is categorically violent under that clause), *on reh'g*, 754 F. App'x 282 (5th Cir. 2019) (vacating prior decision and remanding the case to district court to decide "in the first instance" whether Texas robbery and aggravated robbery are violent felonies under the elements clause). The changing outcomes show that, at a minimum, the issue is worthy of full consideration below.

e. More importantly, this Court should refrain from pre-judging the merits because the Fifth Circuit has not addressed merits here. This Court has "often" said, "we are a court of review, not of first view." *Thacker v. Tennessee Valley Auth.*, 139 S. Ct. 1435, 1443 (2019) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)). Petitioner never received a straightforward decision on the merits in the lower courts. In its original gatekeeping order, the district court invoked a Fifth Circuit directive that it should "dismiss the § 2255 motion *without reaching the merits* if it determines that Patton has failed to make the showing required to file such a

motion." Pet. App. 12a (emphasis added), quoted in Pet. App. 13a. Petitioner asked the district court to re-consider that decision because (a) the court did not have the benefit of Petitioner's prior briefing on the subject (Pet. App. 20a n.1) and (b) recent Fifth Circuit and district court decisions cast doubt on the gatekeeping ruling. Pet. App. 22a–26a. When denying that motion, the district court expressed the view that Petitioner was not allowed to raise any arguments about ACCA's elements clause because those arguments were outside the scope of authorization. Pet. App. 29a & n.1.

The Fifth Circuit likewise refused to decide the merits of the case. After re-characterizing Petitioner's post-judgment motion over his objection, the court decided his appeal was untimely. Pet. App. 8a–9a. Rather than engaging in the first-ever full review of the merits of Petitioner's claim, this Court should reverse the Fifth Circuit's timeliness decision and remand the case to the Fifth Circuit for a ruling on the merits.

5. The chameleonic nature of the district court's dismissal decision demonstrates the danger of extending *Gonzalez v. Crosby* to questions of *appellate* jurisdiction and timeliness. There is no easy way to tell which post-judgment motions are permissible under *Gonzalez* and which are not. Was Petitioner's citation of an intervening Fifth Circuit decision a "conten[tion that] a subsequent change in substantive law is a 'reason justifying relief,'" and thus a successive petition? *Gonzalez*, 545 U.S. at 531. Or was it more akin to Gonzalez's citation of the intervening decision *Artuz v. Bennett*, 531 U.S. 4 (2000), in service of an argument "that a previous ruling which precluded a merits determination was in error?"

Gonzalez, 545 U.S. at 532 n.4. Having been instructed to "dismiss the § 2255 motion without reaching the merits if it determines that Patton has failed to make the showing required to file such a motion," Pet. App. 3a, did the district court nonetheless also decide the merits after finding Petitioner did not satisfy the threshold standard? Pet. App. 6a. These questions are far too complicated to govern the timeliness of an appeal.

Respondent repeatedly trumpets the fact that Petitioner was represented by counsel at the time Petitioner filed the post-judgment motion. U.S. Br. 6, 11, 20, 22. But that isn't usually the case, and it surely weighs against Respondent on the second question presented. Petitioner's counsel is somewhat conversant in matters of federal jurisdiction and justiciability. Yet, under Respondent's view, Petitioner's counsel got it wrong. So, apparently, did the district court; its order denying reconsideration made no mention of the *Gonzalez* doctrine. Pet. App. 29a–30a; *see also* U.S. Br. 16 (recognizing that the district court denied the post-judgment motion "on the merits"). Even Respondent—ably represented by learned counsel—failed to recognize the latent defect in appellate jurisdiction when it opposed expedited issuance of a COA. *Cf.* U.S. Resp. to Emerg. Mot. for COA. Until the Fifth Circuit took over, everyone operated under the benighted view that Petitioner's motion seeking reconsideration of the gatekeeping ruling was what it claimed to be, rather than what the appellate court would later decide it to be.

The *Gonzalez* doctrine prevents a prisoner from "circumvent[ing]" the successive-motion limitations by smuggling a new claim into a post-judgment motion.

545 U.S. at 532. Assuming that the Fifth Circuit was correct about *Gonzalez*, that should only insulate the district court's post-judgment ruling. It should not insulate the underlying judgment, which was timely appealed under Federal Rule of Appellate Procedure 4(a)(4)(A)(iv). Yet the Fifth Circuit dismissed Petitioner's appeal, Pet. App. 8a–9a, based on its view that its reclassification retroactively restored finality to the underlying judgment. The Fifth Circuit has already invoked its timeliness-destruction powers in a case involving a life sentence, *Uranga v. Davis*, 893 F.3d 282, 283–284 (5th Cir. 2018), and would do the same in a death-sentence case. *Id.* 303–304 n.5 (citing a capital-punishment habeas case, *Williams v. Thaler*, 602 F.3d 291 (5th Cir. 2010), in support of the view that a reclassified Rule 59 motion "would not toll the time for filing a notice of appeal").

This Court's intervention is therefore both warranted and necessary.

CONCLUSION

Petitioner respectfully asks that this Court grant certiorari and set the case for a decision on the merits.

Respectfully submitted,

J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
MATTHEW_WRIGHT@FD.ORG
(806) 324-2370

MAY 29, 2019