

No. \_\_\_\_\_

In the Supreme Court of the United States

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LATROY LEON BURRIS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent,*

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MOTION FOR LEAVE TO PROCEED  
*IN FORMA PAUPERIS*

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Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner asks leave to file the accompanying Application to Extend the Deadline to File a Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on August 15, 2019.

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PETITIONER'S APPLICATION FOR EXTENSION  
OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court  
and Circuit Justice for the Fifth Circuit.

Pursuant to Title 28, United States Code, Section 2101(c) and Supreme Court Rule 13.5, Petitioner Latroy Burris respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for 58 days, to and including Thursday, October 31, 2019.

**Basis for Jurisdiction**

The district court had original jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. Mr. Burris pleaded guilty to possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). The Fifth Circuit had jurisdiction over the direct appeal under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. The Fifth Circuit affirmed the conviction and sentence in a published opinion filed on April 10, 2019. App. 1a–24a. Petitioner filed a timely petition for rehearing en banc, but that petition was denied by written order entered on the docket June 3, 2019. App. 26a–27a. This

Court has the power to grant or deny this motion pursuant to 28 U.S.C. § 2101(c), and it will have jurisdiction to review the Fifth Circuit’s judgment under 28 U.S.C. § 1254(1).

### **Judgment to be Reviewed and Opinion Below**

The Fifth Circuit panel’s opinion is published at *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), reprinted on pages 1a–24a of the appendix. The order denying rehearing en banc is reprinted on pages 26a–27a of the appendix.

### **Reasons for Granting an Extension**

At issue in this case is whether Mr. Burris was properly sentenced as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e). In particular, Mr. Burris argues that his prior Texas conviction for simple robbery (Texas Penal Code § 29.02) does not satisfy ACCA’s “elements clause.” Petitioner requests an extension because the case involves multiple complex legal issues and because Petitioner’s counsel has been fully occupied with other assigned matters.

1. The Fifth Circuit struggled with this case. Unlike the Florida robbery statute this Court recently considered in *Stokeling v. United States*, 139 S. Ct. 544 (2019), Texas Penal Code § 29.02 “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 theft (or attempted theft) becomes a robbery whenever the defendant “intentionally, knowingly, or recklessly causes bodily injury to another” or “intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.” Texas Penal Code § 29.02(a).

2. The panel initially reversed the ACCA sentence in a divided published opinion. *See United States v. Burris*, 896 F.3d 320, 327 (5th Cir. 2018). The majority acknowledged considerable debate within the Fifth Circuit and elsewhere over whether causation of injury is always equivalent to the use of physical force, particularly when that injury is caused “recklessly.” After multiple revisions, the Court vacated that opinion in November of 2018. *United States v. Burris*, 908 F.3d 152 (5th Cir. 2018). In April 2019, the court issued a new decision *affirming* the ACCA sentence. That opinion resolved several difficult questions against Petitioner, including:

a. When the language of a state criminal statute plainly includes conduct outside the reach of a federal enhancement, but the defendant is unable to *prove* that the state had actually prosecuted someone for conduct outside the federal definition, who prevails? *Compare Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (An offender arguing “that a state statute creates a crime outside *the generic definition of a listed crime* in a federal statute” must show “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.”); App. 22a (“Burris has not established a ‘realistic probability that Texas would apply its robbery statute to cover conduct that is not capable of causing physical pain or injury.’”); *but United States v. Castillo-Rivera*, 853 F.3d 218, 240–241 (5th Cir. 2017) (en banc) (Dennis, J., dissenting), and cases cited therein (arguing that the Fifth Circuit approach “directly conflicts with

holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits, all of which have recognized the limits of *Duenas-Alvarez*'s requirement").

b. If a crime can be committed by reckless driving leading to a collision, does that crime have use of physical force as an element? Compare *Leocal v. Ashcroft*, 543 U.S. 1, 4, 11 (2004) (holding that a drunk-driving collision resulting in serious injury is not a "use" of force "against" the victim); and *United States v. Castleman*, 572 U.S. 157, 169 (2014) ("[T]he Courts of Appeals have almost uniformly held that recklessness is not sufficient" "to constitute a 'use' of force."); *United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017); *United States v. Fields*, 863 F.3d 1012, 1015–1016 (8th Cir. 2017); *United States v. Middleton*, 883 F.3d 485, 500 (4th Cir. 2018) (Floyd, J., concurring in the judgment and joined by Harris, J.); *with* App. 12a–13a (reckless causation of injury is a use of physical force against the victim); *with* *United States v. Haight*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018).

c. If binding, Fifth Circuit law at the time Petitioner committed his offense *precluded* the application of ACCA's elements clause, but intervening decisions permitted or even required it, may those intervening judicial enlargements of ACCA be applied retroactively? See e.g. *Marks v. United States*, 430 U.S. 188, 194 (5th Cir. 1977) (Courts may not apply an intervening statutory interpretation decision against a criminal defendant if the intervening decision "marked a significant departure from" the law that governed at the time of the offense.). The Fifth Circuit agreed with Petitioner that its intervening decision in *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), "significantly changed this

court's ACCA jurisprudence." App. 14a. Yet the court held that the new expansive interpretation could be applied retroactively without violating due process. App. 14a–15a.

3. Given the complexity of these issues, Petitioner's counsel needs additional time to complete the petition for certiorari. Counsel has been unable to complete the brief in the allotted time due to the press of work in other cases, including the trial in *United States v. Rodriguez*, No. 2:18-CR-108 (N.D. Tex., tried July 29–August 1); the supplemental brief in *United State v. Herrold*, No. 14-11317 (5th Cir., filed August 9, 2019, after one extension); preparation for contested reocation hearings in *United States v. Perez-Gavaldon*, No. 2:16-CR-11 (N.D. Tex. Aug. 7 & 27, 2019); the Initial Brief in *United States v. Taylor*, No. 19-10261 (5th Cir. due Aug. 16, 2019, after one extension, with motion to stay pending); Objections to a PSR Addendum after remand in *United States v. Wheeler*, No. 3:16-CR-75 (N.D. Tex. due Aug. 16, 2019); Objections to a Report and Recommendation in *Vice v. United States*, 3:16-CV-1757 (N.D. Tex. due Aug. 22, 2019, after one extension); the Initial Brief in *United States v. Penn*, No. 19-10168 (5th Cir. due August 30, 2019, after one extension); and the Initial Brief in *United States v. Owens*, No. 19-10254 (5th Cir. due August 29, 2019, after three extensions).

### CONCLUSION

For all these reasons, Petitioner and undersigned Counsel respectfully request that the Court grant an extension fifty-eight days, to and including October 31, 2019, for the deadline to file a petition for certiorari.

Respectfully submitted on August 15, 2019,

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