No. _____

In the

Supreme Court of the United States

MAGDALENO MEDINA, JR.,
ALSO KNOWN AS MAGDALENO MEDINA,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In Texas, a defendant is guilty of aggravated assault if he recklessly causes another person to suffer serious bodily injury (or if he recklessly causes another person to suffer bodily injury using some instrument in a way that is capable of causing serious bodily injury). Is Texas aggravated assault categorically a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)?

2. The Fifth Circuit granted authorization for Petitioner to file a successive motion to vacate his federal sentence containing and relying on the new constitutional rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Did the lower courts have jurisdiction to adjudicate his claim on the merits?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Magdaleno Medina*, No. 6:08-CR-041 (N.D. Texas)

2. *United States v. Magdaleno Medina, Jr.*, No. 09-10514 (5th Cir. June 25, 2009)

3. *In re Medina*, No. 15-11180 (5th Cir. Jan. 8, 2016)

4. *In re Medina*, No. 16-10305 (5th Cir. May 3, 2016)

5. *In re Medina*, No. 16-10664 (5th Cir. June 8, 2016)

6. *United States v. Magdaleno Medina, Jr.*, No. 17-11176 (5th Cir. Jan. 24, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Magdaleno Medina petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion in this case was not s selected for publication in the Federal Reporter. It can be found at 800 F. App'x 223 and is reprinted on pages 1a–9a of the Appendix.

JURISDICTION

The Fifth Circuit issued its opinion affirming the district court judgment on January 24, 2020. On March 19, this Court extended the deadline to file certiorari to 150 days from the judgment. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e); Title 28, Sections 2255 and 2244 of the U.S. Code; and Texas Penal Code Sections 22.01(a) and 22.02(a). These provisions have been reprinted on pages 44a–49a of the Appendix.

STATEMENT

This petition arises in the context of an authorized, successive motion to vacate an ACCA-enhanced sentence. Even though Petitioner secured the Fifth Circuit's authorization to file a successive motion (App., *infra*, 17a–18a), the Fifth Circuit later decided that the district court "lack[ed] jurisdiction" and should have "dismiss[ed] his successive petition without reaching the merits." App. 5a (quoting *United States v.*

Clay, 921 F.3d 550, 554 (5th Cir. 2019)). The Fifth Circuit has held—without any obvious support in the text of 28 U.S.C. § 2255(h)—that a successive movant who relies on *Johnson* must "prove" in district court "that it was more likely than not that he was sentenced under the residual clause." App., *infra*, at 4a. The lower court also deemed this non-statutory inquiry a "jurisdictional" limitation, and thus the court could affirm dismissal even though the Government did not invoke any argument about the sentencing court's mindset in its response to the § 2255 motion. *See* App., *infra*, 19a–26a.

1. In 2009, Petitioner pleaded guilty to possessing a firearm after felony conviction. App., *infra*, 1a. Normally, that offense carries a maximum possible penalty of ten years in prison and three years of supervised release. 18 U.S.C. § 924(a)(2); 18 U.S.C. § 3583(e). But the district court decided to apply the Armed Career Criminal Act, 18 U.S.C. § 924(e). App., *infra*, 1a–2a. That raised the mandatory minimum sentence to 15 years in prison, and allowed the court to impose a five-year term of supervised release. The court imposed the minimum prison term and the maximum supervised release term. App., *infra*, 2a.

2. Petitioner's direct appeal was dismissed for failure to pay the docketing fee. A previous attempt to collaterally attack his conviction and sentence under 28 U.S.C. § 2255 failed.

3. In June 2015, this Court struck down the ACCA's residual clause. *Johnson v. United States*, 135 S. Ct. 2015 (2015). This gave Petitioner some hope of collateral relief; without the residual clause, Petitioner contended, he would no

longer be eligible for sentencing under the ACCA. The Fifth Circuit encouraged that hope when it granted his motion to authorize the filing of a successive § 2255 motion "to challenge his sentence on the ground that his predicate conviction for aggravated assault under Texas Penal Code §§ 22.01 and 22.02 is not a violent felony under the ACCA." App., *infra*, 17a.

4. In response to Petitioner's authorized motion to vacate, the Government did *not* raise any procedural defenses at all—not statute of limitations, nor the "gatekeeping" standards that apply to state prisoners' successive petitions for habeas corpus under under 28 U.S.C. § 2244(b)(3); nor procedural default; nor *any argument at all* about the sentencing court's "reliance" on one clause or another. App., *infra*, 19a–26a. The Government even conceded that Texas *simple* assault did not satisfy the ACCA's elements clause, and that (at least some forms) of Texas *aggravated* assault fell outside the post-*Johnson* reach of ACCA. App., *infra*, 24a–25a. The Government simply argued *on the merits* that the Texas assault with a "deadly weapon," Tex. Penal Code § 22.02(a)(2), was a divisible offense that satisfied the elements clause. App., *infra*, 6a–7a. In support of that argument, the Government submitted (for the first time) conviction documents underlying those aggravated assault convictions. App., *infra*, 28a–43a.

5. The district court agreed with the Government's argument on the merits that Petitioner's "prior assault convictions both fall under the 'use of force' clause of § 924(e)(2)(B)(i)." App., *infra*, 14a. But the district court went further—it also denied the motion because Petitioner did not show, *as a historical matter*, that

"that any of these convictions were ever considered under the statute's residual clause." App., *infra*, 14a. In other words, the district court did not merely hold that the ACCA's elements clause, *correctly construed*, embraced these two convictions. The district court would require Petitioner to prove that the court historically "considered" the residual clause at the time of sentencing. App., *infra*, 14a. Without that evidence, the district court decided that Petitioner's motion was "time-barred because it was filed more than one year after the" conviction and sentence "became final." App., *infra*, 14a.

6. The Fifth Circuit issued a certificate of appealability. App., *infra*, 11a–12a. The court recognized that reasonable jurists could debate whether Texas aggravated assault categorically satisfied the elements clause, and likewise recognized that there were doubts about "the sua sponte nature" of the district court's timeliness ruling. App., *infra*, 12a.

7. The Fifth Circuit affirmed the adverse judgment without even addressing timeliness or the merits. The court instead invoked a *different* procedural defense that the Government waived—the so-called "gatekeeping" function that Congress assigned to district courts when a *state prisoner* filed a petition for habeas corpus, 28 U.S.C. § 2244(b)(4). App., *infra*, 4a–5a n.3. The Fifth Circuit has held that a district court should also perform a gatekeeping analysis for successive *Johnson* motions, and that the implicit gatekeeping ruling can always be revisited on appeal because it goes to the courts' subject-matter jurisdiction. App. 3a (discussing *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018)); *see also* App.

5a & n.3. Because Petitioner could not "prove," to the Fifth Circuit's satisfaction, that his sentencing judge was "more likely than not" actually *thinking about* the residual clause at the time of sentencing. App., *infra*, 9a, the Fifth Circuit decided it did "not have jurisdiction to reach the merits of his claim." App. 9a. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD HOLD THIS PETITION UNTIL IT DECIDES *BORDEN V. UNITED STATES*, BECAUSE THAT CASE WILL ADDRESS THE LEGALITY OF PETITIONER'S ACCA SENTENCE.

Even though the Fifth Circuit decided this case on putative "jurisdictional" grounds, it makes sense to hold this petition until this Court decides *Borden v. United States*, No. 19-5410. The two aggravated assault statutes are nearly identical:

Tennessee Code Annotated (2003)	**Texas Penal Code**
Simple Assault (§ 39-13-101(a)(1)) (a) A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another;	**Simple Assault (§ 22.01(a)(1))** (a) A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
Aggravated Assault (§ 39-13-102(a)(2)) (a) A person commits aggravated assault who * * * *: (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and: (A) Causes serious bodily injury to another; or (B) Uses or displays a deadly weapon.	**Aggravated Assault (§ 22.02(a))** (a) A person commits an offense if the person commits assault as defined in § 22.01 and the person: (1) causes serious bodily injury to another, including the person's spouse; or (2) uses or exhibits a deadly weapon during the commission of the assault.

Both crimes can be committed by recklessly causing another person to suffer serious bodily injury. Texas cases "definitively" hold that reckless assault and intentional assault are alternative means, not distinct elements. *Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016) (discussing *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008)) ("Texas law has definitively answered the 'means or elements' question: the three culpable mental states in section 22.01(a)(1) are 'conceptually equivalent' means of satisfying the intent element, so jury unanimity

as to a particular one is not required."). The same Texas authority proves that "deadly weapon" and "serious bodily injury" are alternative means of proving a single, indivisible offense of aggravated assault. *See Landrian*, 268 S.W.3d at 533 ("The jury did not have to be unanimous on the aggravating factors of whether it was a 'serious' bodily injury or whether appellant used a deadly weapon.").

Because the two statutes are so similar—and because *Borden*, like this case, arises in the context of 28 U.S.C. § 2255—the Court should hold this petition to await the outcome of *Borden*. If Borden is not an Armed Career Criminal, then neither is Petitioner.

II. THE COURT SHOULD GRANT THIS PETITION TO DECIDE WHETHER THE "GATEKEEPING" STANDARD FOR STATE PRISONERS' SUCCESSIVE PETITIONS POSES A JURISDICTIONAL BARRIER FOR FEDERAL PRISONERS' SUCCESSIVE MOTIONS UNDER 28 U.S.C. § 2255(H).

The following proposition should be beyond dispute: no one wants federal prisoners to remain incarcerated beyond the maximum allowable under the law. Congress has certainly decreed that district courts should *vacate* unlawful sentences. 28 U.S.C. § 2255(a)–(b). And Congress has made special provision for offenders like Petitioner, whose sentence was revealed to be *unlawful* by a decision that followed his direct appeal and his first attempt at collateral review. *See* 28 U.S.C. § 2255(h)(2); *accord* 28 U.S.C. § 2255(f)(3). Recognizing the importance of finality (and discouraging repetitive litigation), Congress nonetheless allows a *successive* motion to vacate so long as the motion "contains" a new rule of constitutional law that was not previously available so long as this Court made the rule retroactive. *Johnson* announced just such a rule.

Unfortunately, the lower courts have made a mess of Congress's carefully crafted scheme. They have repeatedly conflated the requirements for *state prisoners* (who file petitions for habeas corpus) with the rules for *federal prisoners* (who are entitled to broader relief under 28 U.S.C. § 2255). The courts have then derived from those state-prisoner limitations a crazy-quilt of non-statutory rules that could never be mastered by a mere mortal. The decision below complicates matters even further by attaching *jurisdictional* significance to the judge-made rule that prisoners have to "prove" what sentencing judges were thinking about before securing a ruling on the merits.

The courts and the parties did a lot of work on this post-conviction case. Petitioner sought, and the Fifth Circuit granted, authorization to file a successive motion to vacate after this Court deemed *Johnson* retroactive. App., *infra*, 17a–18a. The Government filed a detailed response *on the merits* (and only on the merits), including documents that had not previously been considered at sentencing. App., *infra*, 19a–43a. The district court issued its decision, both on the merits and on a waived statute-of-limitations defense. App., *infra*, 13a–15a. The Fifth Circuit granted a certificate of appealability, in part because courts aren't supposed to invoke doctrines waived by a respondent. App., *infra*, 10a–12a.

Then—after all that work—the Fifth Circuit applied the district court gatekeeping standard, which it has been deemed "jurisdictional" in previous opinions. App. 3a–9a (relying on *Wiese*, 896 F.3d 720, and *Clay*, 921 F.3d 550). The court adhered to its view that this standard is jurisdictional, even though the Government

agrees with Petitioner that it is *not* jurisdictional. After all that work, the Fifth Circuit threw the case out without reaching the merits because Petitioner had no "tangible evidence" of what the district court thought about an abstract (and, at the time, irrelevant) question of statutory interpretation. App., *infra*, 6a. This Court should not allow the decision below to stand.

A. If the district-court gatekeeping procedure of § 2244(b)(4) applies to *federal* prisoner motions under § 2255(h), then it is not a "jurisdictional" limitation..

This petition depends upon a simple assertion: whatever the merits of the convoluted analysis mandated by *Clay* and *Wiese*—the need to discern the content or object of a district court's historical "reliance" at a long-ago sentencing—it is not a *jurisdictional* requirement. The Fifth Circuit decided that this issue was "foreclosed by" its prior decision in *Clay*. App., *infra*, 5a n.3. But this Court's precedent plainly provides that such a rule cannot be "jurisdictional."

This Court "has endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). The difference between a jurisdictional rule and a non-jurisdictional rule is important:

> When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety. "[M]any months of work on the part of the attorneys and the court may be wasted." Courts, we have said, should not lightly attach those "drastic" consequences to limits Congress has enacted.

Id. (citations omitted).

That is important here, because the Government did not raise any argument about gatekeeping, or about historical precedent, or about the sentencing judge's *mindset*, when it filed its opposition. The Government instead made a straightforward (but incorrect) argument under *current* federal law: that Texas aggravated assault is divisible. App. 23a. In support of that argument, the Government submitted court records that had *never* been considered before.

But the Fifth Circuit delved deeply into its own "gatekeeping" analysis because—in its view—§ 2255(h) incorporates § 2244(b)(4), and the latter provision is "jurisdictional." *See*, *e.g., In re Davila*, 888 F.3d 179, 183 (5th Cir. 2018) ("We have previously described Section 2244 as establishing two jurisdictional 'gates' through which a petitioner must proceed to have the merits of his successive habeas claim considered."); *Wiese*, 896 F.3d at 724 (ascribing "jurisdictional" significance to the district court's gatekeeping analysis); *Clay*, 921 F.3d at 554 ("Where a prisoner fails to make the requisite showing before the district court, the district court lacks jurisdiction and must dismiss his successive petition without reaching the merits.").

This case illustrates the dangers of a too-hasty rush to apply the "jurisdictional" label. The parties and the lower courts labored over this case for years. The Fifth Circuit's eleventh-hour focus on an *unanswerable* question (about. what the district court might or might not have been thinking at the time of sentencing) made all the prior work useless.

It is worth considering whether § 2255(h) actually incorporates § 2244(b)(4), and if so, whether the latter standard is *jurisdictional*. This distinction is critical in

this case. The Government *never* invoked the gatekeeping standard in district court. The Government did not raise any complaint about the *historical facts* of the original sentencing, nor did it argue that Petitioner failed to satisfy any prerequisite to obtain a merits ruling on his authorized motion. Thus, if the district-court gatekeeping standard is *waivable*, the Government waived it. If it is forfeitable, the Government forfeited it. And if the rule is not jurisdictional, "the panel's takeover of the appeal" was an abuse of discretion because the Government chose to litigate the case on entirely different points. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020).

This Court has adopted a clear-statement principle that should settle the matter: "A rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Gonzalez*, 565 U.S. at 141–142. In other words, if Congress does not *clearly* describe a rule as jurisdictional, it isn't. And Congress has not *clearly* described the substantive gatekeeping standards as jurisdictional. Congress hasn't even said the district-court standard in § 2244(b)(4) applies to § 2255(h) at all.

Gonzalez analyzed a nearly identical statutory limitation and decided that it was *not* jurisdictional. The case concerned certificates of appealability under 28 U.S.C. § 2253. The certificate of appealability in *Gonzalez* was deficient; the question

was "whether that defect deprived the Court of Appeals of the power to adjudicate Gonzalez"s appeal. *Id.* at 141. This Court held that the defect was *not* jurisdictional.

COAs are governed by 28 U.S.C. § 2253:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253.

The only part of the COA statute that is clearly jurisdictional is the *procedural* demand found in § 2253(c)(1)—a court or judge must issue a COA before the Court of Appeals can rule on the merits of an appeal. *Gonzalez*, 565 U.S. at 142. Unless and until that happens, appellate courts lack jurisdiction to resolve the merits. *Id.* (citing *Miller–El v. Cockrell*, 537 U.S. 322 (2003)).

But the *substantive* requirements for a valid COA are *not* jurisdictional. Most relevant here is § 2253(c)(2), which explains exactly what an inmate must show to obtain the COA. The *substantive* rules for issuing a COA are not jurisdictional:

> The parties also agree that § 2253(c)(2) is nonjurisdictional. That is for good reason. Section 2253(c)(2) speaks only to when a COA may issue—upon "a substantial showing of the denial of a constitutional right." It does not contain § 2253(c)(1)'s jurisdictional terms. *And it would be passing strange if, after a COA has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge its "substantial[ity]" to verify its jurisdiction. That inquiry would be largely duplicative of the merits question before the court.*

Gonzalez, 565 U.S. at 143 (citations omitted, emphasis added). This passage should resolve this petition entirely in Petitioner's favor.

Like the COA statute, the pre-filing authorization statute for federal prisoners has only one mandatory jurisdictional requirement, and it is *procedural*:

> (h) A second or successive motion *must be certified* as provided in section 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. § 2255(h) (emphasis added). The issuance of authorization under § 2255(h) operates just like the issuance of a COA under § 2253—once secured, the reviewing court gains jurisdiction to decide the case.

The contrary proposition, which has often been stated in the Fifth Circuit but which has never been carefully examined, is a difficult pill to swallow. That's because the *Wiese-Clay* inquiry is difficult and unpredictable. The Fifth Circuit has held that a defendant cannot rely on intervening decisions, because they are "of no consequence to determining the mindset of a sentencing judge" at the time of sentencing. *See Wiese*, 896 F.3d at 725. But this Court has held that a federal defendant *can* rely on new, non-constitutional substantive rules in support of a claim on collateral review. *See Bousley v. United States*, 523 U.S. 614, 621 (1998) ("[I]t would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on" intervening substantive, non-constitutional decisions.).

This Court should follow *Gonzalez* and hold that the *Wiese-Clay* interpretation of § 2244(b)(4) is, *at most*, a non-mandatory claims-processing rule. That is the only outcome consistent with *Gonzalez*. It would be "passing strange if, after" a defendant obtains authorization from a panel of the Court of Appeals; obtains a merits ruling from the district court; *and* "a COA has issued, each court of appeals adjudicating an appeal were duty bound" to engage in the complex analysis demanded by *Wiese* and *Clay*. To whatever extent § 2255(h) incorporates the *Wiese-Clay* rule, the rule is non-jurisdictional.

B. The Fifth Circuit decision conflicts with the authoritative decision of the Sixth Circuit in *Williams v. United States*.

The Sixth Circuit, after hearing detailed argument about the jurisdictionality of § 2244(b)(4), recognized "that the substantive requirements of § 2255(h) are nonjurisdictional." *United States v. Williams*, 927 F.3d 427, 434 (6th Cir. 2019). Like

Petitioner, the defendant-movant-appellant in *Williams* "secured" prefiling authorization from the Court of Appeals before filing his successive motion under § 2255. *Id.* at 434 n.4. That was the only jurisdictional prerequisite.

Williams recognized that *Gonzalez* provides "the closest analogy" for this situation. *Id.* at 437. Just as *Gonzalez* held that "[a] defective COA is not equivalent to the lack of any COA," 565 U.S. at 143, *Williams* held that a "defective" authorization order (e.g., one that somehow fails to "contain" the new rule in *Johnson*) is not the same thing as having no authorization order. 927 F.3d at 434–439 ("Obtaining authorization to file a second or successive § 2255 motion maps onto this analysis tightly.").

Williams then rejected the only remaining argument—that § 2244(b)(4) somehow gave rise to a *jurisdictional* requirement of "post-authorization vigilance." *Id.* at 438. Section 2255 (not § 2244) governs motions by federal prisoners, and its substantive requirements are nonjurisdictional. In both Sections—2244 and 2255—the *jurisdictional* requirements are "procedural," but the substantive requirements are not. *Id.* at 438–439 ("We therefore hold that § 2244(b)(4) does not impose a jurisdictional bar on a federal prisoner like Williams seeking relief under § 2255 either.").

The Government actually *agrees* with Petitioner (and with the Sixth Circuit in *Williams*) that the substantive district-court-gatekeeping standards are non-jurisdictional. *See, e.g.*, U.S. Notice of Change in Litigating Position, *United States v. Gresham*, No. 4:16-CV-519 (N.D. Tex. filed Feb. 15, 2018) ("[T]he government no

longer takes the position that this Court's gatekeeping function under 28 U.S.C. § 2244(b)(2)(A) is a jurisdictional one."). The Government's argument on that score is quite persuasive. *See* U.S. Letter Brief, *Williams v. United States*, No. 17-3211 (6th Cir. filed June 14, 2018); *accord* Leah M. Litman & Luke C. Beasley, *Jurisdiction and Resentencing: How Prosecutorial Waiver Can Offer Remedies Congress Has Denied*, 101 Cornell L. Rev. Online 91, 107 (2016).

C. The jurisdictional issue is important enough to warrant Supreme Court review.

A federal court's "'obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013)). Without any detailed analysis, the Fifth Circuit has decreed that its convoluted gatekeeping standard for successive motions under *Johnson* is "jurisdictional."

The Fifth Circuit has repeatedly applied this so-called "jurisdictional" rule, even when challenged. *See United States v. Dennis*, 18-10025, 2020 WL 1867983, at *1 n.1 (5th Cir. Apr. 14, 2020) ("We are bound by our precedent, not the position of the U.S. Department of Justice."), reh'g denied (June 15, 2020). In the Sixth Circuit, there is no such jurisdictional rule.

That means that the Fifth Circuit will continue to refuse to exercise jurisdiction that Congress has delegated to the Court, with the effect that prisoners (like Petitioner) will continue to suffer illegal sentences. This Court should give the

matter full consideration given the "drastic" consequences that the "jurisdictional" label carries for Petitioner and for others like him. *See Gonzalez*, 565 U.S. at 141.

Given that this Court has granted certiorari to decide whether a materially identical aggravated assault crime remains a violent felony after *Johnson*, the Fifth Circuit's so-called "jurisdictional" rule could make the difference between continued incarceration and immediate release for Petitioner.

CONCLUSION

Petitioner asks that this Court (a) hold the petition pending a decision in *Borden*; and then (b) grant the petition to resolve the circuit conflict regarding the so-called "jurisdictional" application of § 2244(b)(4) to an authorized successive § 2255 motion.

Respectfully submitted,

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