CASE NO. 20-5172 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

DARRELL HENRY WILLIAMS

Petitioner,

v.

JOE COAKLEY, Warden, Hazelton USP

Respondent.

On Petition for a Writ of Certiorari

To the Fourth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do criminal statutes satisfied by reckless conduct resulting in injury require as an element "the use . . . of physical force against the person of another" within the definition of the mandatory career offender Sentencing Guideline U.S.S.G. § 4B1.2(a)(1)?

2. Whether "the remedy by motion" authorized by 28 U.S.C. §2255(h)(2) is rendered "inadequate or ineffective" under §2255(e) when a federal appellate court makes the primary criterion for authorizing a second §2255 petition the federal prosecutor's consent to it?

LIST OF PARTIES

Petitioner Darrell Henry Williams appeared pro se in the lower court proceedings in the Northern District Court of Western Virginia and in the United States Court of Appeals for the Fourth Circuit. No attorney entered an appearance on behalf of Joe Coakley, Warden of Hazelton USP, in the Fourth Circuit, nor in the Northern District Court of West Virginia. The Bureau of Prisons transferred Petitioner's custody to MCFP Springfield, P.O. Box 4000, Springfield, MO. 65801, while this case was pending in the District Court for the Northern District of West Virginia.

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JURISDICTION

The date on which the United States Court of Appeals decided my case was April 17, 2020. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Art. I, §9, cl. 2, U.S. Const.

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

18 U.S.C. §924(e)(2)(B)

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. §924(e)(2)(B), provides:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
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> (3) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (4) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

28 U.S.C § 2255(e)

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(h)(2)

(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—

(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. § 2244(b)(3)(A)

The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

United States Sentencing Guidelines Provisions

U.S.S.G. §4B1.2(a) (2000)

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

State Statutes

Mo. Rev. Stat. § 565.060 (1978). Assault in the second degree.—1. A person commits the crime of assault in the second degree if:

(1) He knowingly causes or attempts to cause physical injury to another person by means of a deadly weapon or dangerous instrument; or

(2) He recklessly causes serious physical injury to another person; or

(3) He attempts to kill or to cause serious physical injury or causes serious physical injury under circumstances that would constitute assault in the first degree under section 565.050, but

(a) Acts under the influence of extreme emotional disturbance for which there is

a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor believes them to be; or

(b) At the time of the act, he believes the circumstances to be such that, if they existed, would justify killing or inflicting serious physical injury under the provisions of Chapter 565 of this code, but his belief is unreasonable.

2. The Defendant shall have the burden of injecting the issues of extreme emotional disturbance under paragraph (a) of subdivision (3) of subsection 1 or belief in circumstances amounting to justification under paragraph (b) of subdivision (3) of subsection 1.

3. Assault in the second degree is a class D felony.

(Effective 1-1-79).

Tenn. Code Ann. § 39-13-102 (2005):

(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.

Tenn. Code Ann. § 39-13-101 (2005)

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another[.]

STATEMENT OF THE CASE

On December 1, 2000, a federal jury in St. Louis convicted Mr. Williams of conspiring to distribute over 500 grams of cocaine, in violation 21 U.S.C. §841(a)(1) and escape, in violation of 18 U.S.C. § 751(a). The District Court for the Eastern District of Missouri calculated the mandatory Sentencing Guidelines for Mr. Williams's sentence at level 34, applying the career offender Sentencing Guidelines in U.S.S.G. §4A1.2(a) (2000). This increased the mandatory Sentencing Guidelines range of imprisonment from 188-235 months up to 262-327 months. The Court relied on a Missouri robbery conviction plus either a Missouri conviction for second degree assault committed at age 15—an offense that is satisfied when one "recklessly causes serious physical injury to another person," Mo. Rev. Stat. §565.060.1.(2) (1978)—or a Missouri conviction for attempted escape at age 21, which qualified as a crime of violence only under an unconstitutionally vague residual definition in U.S.S.G. § 4B1.2(a)(2) (2000). On December 1, 2000, a judge in the Eastern District of Missouri applied the mandatory career offender guideline to sentence Petitioner to 310 months in prison for the conspiracy and a concurrent 60 months for escape. Petitioner took a direct appeal challenging improper joinder of the charges for trial, challenges to evidentiary rulings, and prejudicial closing arguments. The Eighth Circuit Court of Appeals affirmed on July 3, 2002, United States v. Williams, 295 F.3d 817 (8th Cir. 2002). His petition for a writ of certiorari was denied January 27, 2003.

Petitioner filed a petition for habeas corpus under 28 U.S.C. §2255, in the United States District Court for the Eastern District of Missouri on December 31, 2003, in No. 4:04-CV-001 CAS (E.D. Mo.). He alleged numerous claims of ineffective assistance of counsel and further alleged that his prior convictions should not have qualified as predicate "crimes of violence" needed to apply the mandatory career offender guideline. His claims were denied on April 23,

2007, and no certificate of appealability issued. The Eighth Circuit also denied his request for a certificate of appealability.

Following this Court's decision in Johnson v. United States, 135 S. Ct. 2251 (2015), petitioner sought permission from the Eighth Circuit to file a second or successive habeas corpus petition ("SOS petition") to pursue a claim that his mandatory career offender guidelines sentence had become invalid under the new Constitutional rule in Johnson v. United States, 135 S. Ct. 2251 (2015), made retroactive by Welch v. United States, 136 S. Ct. 1257 (2016). Williams v. United States, No. 16-2821/16-2901 (consolidated by the Eighth Circuit). He cited a First Circuit decision declaring that the 2015 Johnson decision applied to mandatory career offender Guidelines sentences imposed before United States v. Booker, 543 U.S. 220 (2005), because they "fixed" the mandatory perimeters of his range of imprisonment at the time of his sentencing. United States v. Moore, 871 F.3d 72 (1st Cir. 2017). On November 9, 2017, a three-judge panel issued an order summarily denying the petition without explanation.

On March 26, 2018, petitioner filed a habeas corpus petition under 28 U.S.C. §2241, along with a Memorandum of Law in the Northern District of West Virginia, where he was then imprisoned at Hazelton USP. He invoked jurisdiction based on the savings clause of 28 U.S.C. §2255(e) on the basis that the Eight Circuit Court of Appeals applied unconstitutional standards to deny him permission to pursue a second petition under § 2255. He alleged that his Missouri convictions for assault and escape no longer qualified as a "crimes of violence" required to impose a career offender guideline sentence, and that he was entitled to review of and relief from his sentence pursuant to 28 U.S.C. §2241. He cited Johnson's invalidation of the identical "residual clause" definition for violent felony under the Armed Career Criminal Act,

18 U.S.C. §924(e)(2)(B)(ii), by which the Eighth Circuit qualified any crime arguably posing a "substantial risk of physical harm to another."

Petitioner argued that the savings clause of 28 U.S.C. §Section 2255(e) established jurisdiction to proceed with a §2241 petition because, as applied in the Eighth Circuit, the remedy by a successive Section 2255 motion based on a new constitutional rule made retroactive by the Supreme Court was ineffective and adequate, and amounted to a suspension of the writ of habeas corpus in violation of Article I, Section 9 of the Constitution. Petitioner explained that the Eighth Circuit rendered the remedy by an SOS 2255 petition inadequate and ineffective by making a primary criterion the willingness of the federal prosecutor in the case to consent to the SOS motion. He argued that this negated the habeas corpus role § 2255 serves as a bulwark against government overreach. Petitioner asked the Court to judicially notice numerous SOS petitions the Eighth Circuit granted when prosecutors agreed, and the denial of identical claims when (as in petitioner's case) a prosecutor objected. See Appendix _. He explained that the Eighth Circuit's approach to SOS motions raising Johnson claim rendered the remedy by 2255 motion "ineffective and inadequate," because deferring to the government's choice of who may pursue relief made the remedy unfit to its intended purpose as a check on the executive.

Petitioner also explained that the Eighth Circuit modified the "prima facie" showing for SOS applications citing the new constitutional rule in Johnson to require a further showing that the new due process "vagueness" rule was sufficient to bring relief to the petitioner, exceeding the tentative inquiry Congress established in Sections 2241(b)(3)(C) and 2255(h)(2).

Hon. Magistrate Judge James P. Mazzone, issued a report and recommendation that the proceeding be dismissed, essentially reaching the merits of petitioner's challenge to his

Missouri convictions for robbery and assault based on the 2015 Johnson case. Petitioner timely objected to the Magistrate's reasons. On March 19, 2018, Hon. Frederick P. Stamp, Jr., Senior U.S. District Court Judge, overruled petitioner's objections and adopted the Magistrate's Report and Recommendation. Appendix _.

Petitioner timely appealed to the Fourth Circuit Court of Appeals. After accepting Petitioner's Informal Opening Brief under local rule, the District Court issued a per curiam, unpublished opinion stating:

> Darrell Henry Williams, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and dismissing Williams' 28 U.S.C. § 2241 (2018) petition in which he sought to challenge his sentence by way of the savings clause in 28 U.S.C. § 2255 (2018). Pursuant to § 2255(e), a prisoner may challenge his sentence in a traditional writ of habeas corpus pursuant to § 2241 if a § 2255 motion would be inadequate or ineffective to test the legality of his detention.
>
> > [Section] 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.
>
> United States v. Wheeler, 886 F.3d 415, 429 (4th Cir. 2018).
>
> We have reviewed the record and find no reversible error. Accordingly, although we grant leave to proceed in forma pauperis, we affirm for the reasons stated by the district court. Williams v. Coakley, No. 5:18-cv-00046-FPS (N.D.W. Va. Oct. 29, 2019).

Appendix 2.

REASONS FOR GRANTING CERTIORARI

1 The Court should grant certiorari or, in the alternative hold the case pending this Court's decision in *Charlie Borden v. United States*, which may well repudiate the Fourth Circuit's ruling that Missouri second-degree assault is a crime of violence.

The mandatory "career offender" Sentencing Guidelines the District Court for the Eastern District of Missouri adopted to "fix the punishment" in petitioner's case in 2002 depended on a 1982 conviction for "assault in the second degree," as the District Court for the Northern District of West Virginia itself held, with the Fourth Circuit's concurrence. Appendix _, p. _. See Beckles v. United States, 137 S. Ct. 886, 892 (2017) (after 2005, "advisory Guidelines [did] not fix the permissible range of sentences"). The courts below, however, wrongly held that because the Presentence Investigation Report in petitioner's case described underlying conduct consisting of firing a gun at others, his 1982 assault conviction required "as an element, the use, attempted use, or threatened use of physical force against the person of another," and satisfied U.S.S.G. §4B1.2(a)(1) (2000). The Fourth Circuit's analysis clashes with this Court's long-established "categorical analysis" of alleged prior convictions under the "element of force" definition, Taylor v. United States, 495 U.S. 575, 600-601 (199), and this Court's more recent emphasis on state court interpretations of the statutes on which prior convictions rest to discern alternative means from elements a jury must find. See Mathis v. United States, 136 S. Ct. 2243, 2256 (2016).

This Court has "often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than" the "violent felony" definition the government claims it falls within. See Taylor, 495 U.S. at 602. Even if the "'underlying brute facts or means' of commission" in a defendant's particular case "fits within the generic offense,

the mismatch of elements saves the defendant from an ACCA sentence." Mathis, at 2246, quoting Richardson v. United States, 526 U.S. 813, 817 (1999). In both sentencing contexts, "[t]he first task for a sentencing court faced with an alternatively phrased statute is ... to determine whether its listed items are elements or means." Mathis, 136 S. Ct. at 2256. If they are elements, the court may engage in the limited review of record materials to discover which of the enumerated alternatives played a part in the de3fendant's prior conviction, and then compare that definition of the crime to the definition for the predicate crime of violence. Id. "If instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." Id. The language and structure of a statute itself may be decisive or at least circumstantial proof of the answer. If statutory alternatives carry different punishments, then they must be elements. Id., citing Apprendi v. New Jersey, 530 U.S. 466 (2000).

The "element of force" definition in U.S.S.G. §4B1.2(a)(1) compels a "categorical focus" on the elements by which a state defines an offense, rather than on an individual defendant's actual underlying conduct. See Mathis, 136 S. Ct. at 2248, Taylor, 495 U.S. at 599-602. Accord United States v. Davis, 139 S. Ct. 2319, 2339 (2019) (element of force by definition categorically focuses on elements). Although Mathis and Taylor specifically dealt with an identical "element of force definition in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2), this Court like all of the Circuits interpret the guideline and ACCA definitions interchangeably, see, e.g. Johnson, 135 S. Ct. at 2560 (citing Sentencing Guidelines cases, e.g., United States v. Whitson, 597 F.3d 1218 (11th Cir. 2010) & United States v. Williams, 559 F.3d 1143 (10th Cir. 2009)). Because the categorical analysis "examines what the state conviction necessarily involved and not the facts underlying the case, it presumes that the

conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized[.]" Moncrieffe v. Holder, 569 U.S. 184, 191 (2013). Furthermore, the fact a statute disjunctively lists a series of alternative ways one can violate a law does not establish that each alternative is a separate offense, as opposed to various means about which a jury need not unanimously agree. Mathis, at 2256-57. State case law interpreting predicate statutes often provide clarity in deciding whether a statute lists means rather than independent offenses. Id.

The Supreme Court of Missouri has consistently held that disjunctive alternatives in Missouri's criminal statues should be construed as listing various ways of committing a single crime. See United States v. Naylor, 887 F.3d 397, 401 (8th Cir. 2018). The state's high court has explained "if a statute makes criminal the doing of this, or that, or that, mentioning several things disjunctively, there is but one offense, which may be committed in different ways; and in most instances all may be charged in a single count . . . And proof of the offense in any one of the ways will sustain the allegation." Id. at 401-02, quoting State v. Hartman, 273 S.W.2d 198, 203 (Mo. banc 1954). "In other words, where a Missouri statute enumerates a list of prohibited activities disjunctively, the statute creates only one crime, albeit a crime that can be committed in a variety of ways." In such instances, all of the several acts may be charged conjunctively in one count, and the count will be sustained by proof of one of the offenses charged."). Naylor, at 402, quoting State v. Fitzpatrick, 193 S.W.3d 280, 282 (Mo. Ct. App. 2006). The conclusion that the various alternatives constitute merely interchangeable means rather than elements that must be specifically proved and found by the jury is bolstered when a statute applies the same punishment to every variation. See Mathis, at 401.

The Missouri assault statute Mr. Williams was convicted of violating in 1982 listed various forms second-degree assault could take disjunctively, each of them carrying the

identical punishment. Mo. Rev. Stat. § 5565.060.1(1)-(3) (1978), each of them carrying the identical punishment, §565.060.3 (1978). The least egregious alternative occurs when one "recklessly cause serious physical injury to another person." §565.060.1(2). In light of the Missouri case law quoted above, the single statute indivisibly encompasses one who "recklessly" causes serious physical injury to another person with the knowing causation of physical injury to another person by means of a deadly weapon or dangerous instrument, §565.060.1(1). See Descamps v. United States, 570 U.S. 254, 272 (2013). What's more, Missouri case law plainly establishes that "reckless" assaults encompass purely accidental behavior. See State v. White, 138 S.W.3d 738, 788 (Mo. Ct. App. 2004) (reckless handling of shotgun resulting in injury to another quailed as intentional shooting, even though every eyewitness-including the victim-testified the gun went off accidentally). This Court, however, has previously observed that accidental conduct conflicts with the notion of affirmative use of force against the person of another, see Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). The "key phrase" in the "element of force" definition consists of "the [use . . . of physical force against the person . . . of another'—[which] most naturally suggests a higher degree of intent than negligent or merely accidental conduct." Id. The Missouri case law declaring that purely accidental inflection of injury by a deadly weapon establishes that the least conduct required to violate the statute does not constitute the use of force "against another." Decisions from three circuits have held that accidental conduct producing injury to another does not constitute the use of force against another under the ACCA. See United States v. Mendez-Henriquez, 847 F.3d 214, 220-22 (5th Cir. 2017) (Guidelines case); United States v. Haight, 892 F.3d 1271, 1280-81 (D.C. Cir. 2018); United States v. Verwiebe, 874 F.3d 258, 262 (6th Cir. 2017).

In fact, this Court is poised to resolve a circuit split on whether crimes committed with a reckless mens rea constitute the "use of force . . . against another" in Christopher Borden, Jr. v. United States, No. 19-5410. Borden's case involves Tennessee's reckless aggravated assault law prohibiting the felony of reckless aggravated assault, defined as "recklessly causing bodily injury to another" by one who "uses or displays a deadly weapon." Tenn. Code Ann. §39-13-102(a)(2)(A)-(B) (2005), incorporating Tenn. Code Ann. § 39-13-101(a)(1) (2005)). See Borden, Petition for Certiorari, pp. 3, 5, 8, 11-12 (filed July 24, 2019). Like Missouri's firearm "exhibiting" offense, Tennessee's reckless aggravated assault does not require that an offender intend to injure anyone, but only "requires the [defendant's] act to either cause serious bodily injury or be committed with the use or display of a deadly weapon[.]" See State v. Bonds, No. W2005-02267-CCA-R3-CD, 2006 WL 2663753, at *9 (Tenn. Crim. App. Sep. 15, 2006).

In Borden, this Court will necessarily decide whether the ACCA definition for "violent felonies" having as an element the use or threatened use of force "against the person of another" encompasses only those crimes categorically defined by a perpetrator's use of force targeted at another person. Although the merits briefs in Borden have not yet been filed, the merits brief in Walker made the issue of whether the ACCA "element of force" definition requires a "targeted" use of force against another central to the issue. This issue lies at the heart of the tension between the ruling in Leocal that a definition for crime of violence as an offense having as an element "the use . . . of force against the person or property of another" "suggests a higher degree of intent than negligent or merely accidental conduct," and Voisine v. United States, 136 S. Ct. 2272, 2276 (2016). The Voisine decision construed a statute defining predicate crimes having as an element any "use or attempted use of physical force" by

a person who has a specified relationship with a specific class of victim (such as a domestic partner), without limiting the conduct to a use of force "against the person of another." Id., citing 18 U.S.C. §921(a)(33)(A)(ii). Hence, the question of whether the "element of force" definition requires a targeted use of force stands squarely before this Court in Borden. This Court's resolution of that case will inevitably bear on the validity of the Fourth Circuit's terse ruling that Missouri's second-degree assault statute as a predicate crime of violence.

This Court's resolution of the issue in Borden will inevitably confirm or repudiate the Fourth Circuit's terse ruling that Missouri's assault statute requires as an element the use of force "against the person of another." If this Court holds that the ACCA "element of force" definition encompasses only offenses that require a "targeted" use of force directed at the person of another, the Fourth Circuit's ruling in petitioner's case will be invalid. Therefore, it serves the interests of judicial economy to hold this petition for certiorari for disposition pending the decision in Borden.

2. This case raises the serious constitutional threat consisting of a Circuit's making the right to file an SOS-motion dependent on a prosecutor's assent contrary to habeas corpus's role as a bulwark against prosecutorial excess.

Petitioner's pleadings illustrated that the "remedy by motion" under § 2255 was rendered "ineffective [and] inadequate" because the Eighth Circuit explicitly made the primary gatekeeping criterion under §2255(h)(2) the federal prosecutor's willingness to consent to the filing of an SOS motion based on the 2015 Johnson case. His briefs and pleadings set out starkly conflicting decisions according to the willingness of individual prosecutors to consent to an SOS motion. See Appendices E and F. The Fourth Circuit's decision in United States v. Wheeler, 886 F.3d 429 (2018) did not contemplate or address this issue. A prior decision's

implicit resolution of an issue neither "raised in briefs or argument nor discussed in the opinion of the Court" is not binding precedent. See United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952).

Article I, § 9 guarantees that the right to pursue habeas corpus shall not be suspended, except in cases of war. Its Constitutional purpose is to provide a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004), citing INS v. St. Cyr, 533 U.S. 289, 301 (2001). Dating back to the "formative years of our Government, . . . the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." Id. at 301-302 and n. 18 (citing cases therein). It has remained since the founding of this nation, "the stable bulwark of our liberties." Boumediene v. Bush, 553 U.S. 723, 742 (2008). It serves to protect the separation of powers on which the Framer's centrally depended to ensure liberty and remedy its wrongful denial. Id. at 743. Section 2255 was "designed to strengthen, rather than dilute, the writ's protections." Id. at 776. See also Hill v. United States, 368 U.S. 424, 427 (1962) (Section 2255 "was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district court where the prisoner was confined."). Congress inserted the savings clause to preserve the habeas remedy for those instances wherein "it also appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [a prisoners] detention." 28 U.S.C. § 2255(e).

After the Supreme Court struck the residual clause definition for predicate violent felonies in 18 U.S.C. § 924(e)(2)(B)(ii) in Johnson, the Eighth Circuit issued a decision

declaring that the prima facie showing that would satisfy § 2255(h)(2) could be made "[b]ased on the government's concession" of the retroactivity of a new Supreme Court rule. Woods v. United States, 805 F.3d 1152, 1154 (8th Cir. 2015). The Eighth Circuit in "Woods relied entirely on a concession by the government and conducted no analysis of whether the Supreme Court's recent decision in Johnson announced a new rule of Constitutional law that has been [made retroactive to cases on collateral review]." Menteer v. United States, 806 F.3d 1156 (8th Cir. 2015). See also Richardson v. United States, No. 15-3188, 2015 WL 8956210 (8th Cir., Dec. 16, 2015) (unpublished) (granting SOS petition to challenge ACCA predicate because government agreed to it, but denying SOS petition to extent it challenged a residual clause Guidelines enhancement because the government opposed it).

Under the standards the Eighth Circuit applied to prisoners' requests to file SOS-petitions based on Johnson, the Circuit freely granted requests on little more than a federal prosecutor's "say-so", yet denied requests to challenge identical predicates when prosecutors opposed them. See Appendix, citing cases listed in Petitioner's Brief in the 4th Circuit. This amounts to a suspension of the writ, in violation of Art. I, §9, U.S. Const.

The Eighth Circuit's approach to the "gatekeeping" under 28 U.S.C. §§2255(h)(2) & 2244(b)(3) as to requests based on Johnson, rendered the remedy of § 2255 petitions subject to a roll of the dice, instead of an adequate and effective legal vehicle serving the Constitutional function the Founders and Congress intended it to ensure. A remedy that measures a prisoner's ability to challenge the constitutionality of his imprisonment on the willingness of the government to "agree" to the challenge makes the remedy a "crap shot" depending on "little more than the government's say-so," see Hamdi, 542 U.S. at 513.

A. The 8th Circuit's rule that SOS-motions must show a new rule is adequate to win relief exceeds the limited § 2255(h)(2) inquiry, contrary to Buck v. Davis

The Eighth Circuit's application of 28 U.S.C. § 2255(h)(2) further conflicts with the limited preliminary inquiry as to the "potential merit" in an SOS applicant's proposed claim. Congress authorized the Circuit Courts of Appeal to make only a tentative determination of whether a prima facie showing that the applicant satisfies the criteria of Section 2255(h)(2), see 28 U.S.C. § 2244(b)(3)(C). Prior to the 2015 Johnson decision, the Eighth Circuit recognized that "a prima facie showing in this context is 'simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." Kamil Johnson v. United States, 720 F.3d 720, 721 (8th Cir. 2013). However with reference to petitions based on the 2015 Johnson case, the Eighth Circuit declared that "a 'new rule of constitutional law' that warrants authorization under § 2255 under §2255(h)(2) likewise must be sufficient to justify a grant of relief." Donnell v. United States, 826 F.3d 1014, 1016-17 (8th Cir. 2016) (emphasis in original).

Congress did not authorize the Circuit Courts of Appeal to grant requests to file SOS petitions according to the appellate court's view of the applicant's ultimate right to relief on the merits. In Buck v. Davis, this Court held that the Fifth Circuit similarly exceeded the limited scope of analysis governing a habeas petitioner's right to a "certificate of appealability" ("COA") under 28 U.S.C. § 2253. 137 S. Ct. at 774. That statute limited habeas corpus appeals to those in which a district court or the Court of Appeals find a claim that is "reasonably debatable" by jurists of reason. The Fifth Circuit used terminology that granted lip service to the "reasonably debatable" standard, yet this Court found that the Fifth Circuit "reached [its] conclusion [denying the COA] only after essentially deciding the case on the merits." Id. at 773. At the COA phase, the Chief Justice wrote for the Court, the only question is whether the applicant showed that "jurists of reason could disagree with the district court's resolution of his

constitutional claims or that jurists could conclude the issue presented are adequate to deserve encouragement to proceed further." Id. This Court explained,

> "[t]hat a prisoner has failed to make the ultimate showing that his claim is meritorious dos not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and 'first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner at the COA stage..."

The "reasonably debatable issue" standard for COAs resembles the "tentative" prima facie threshold applicants seeking to file an SOS petition must satisfy. The heightened threshold the Eighth Circuit adopted for Johnson-based petitions clearly violates SOS applicants' rights to procedural due process by exceeding the limited inquiry to which Congress limited the Courts of Appeals in Sections 2255(h)(2) and 2244(b)(3)(C). This rendered "the remedy by [§2255(h)(2)] remedy" both inadequate and ineffective.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be granted, or in the alternative, held pending this Court's decision in Christopher Borden v United States.

Respectfully submitted,

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