

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOE HERNANDEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

**MOTION FOR LEAVE TO PROCEED
*IN FORMA PAUPERIS***

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner Joe Hernandez asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit 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), in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: October 2, 2020

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record



H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

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H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTIONS PRESENTED

- I. Does a protective sweep of person's entire residence by law enforcement officers pursuant to "standard procedure" upon their entry when serving an arrest warrant conflict with this Court's decision in *Maryland v. Buie*, 494 U.S. 325 (1990)?
- II. Can a protective sweep of an entire residence that is conducted pursuant to "standard procedure" upon entry by law enforcement officers serving an arrest warrant be justified solely by the personal characteristics and affiliations of the resident named in the warrant in the absence of "probable cause to believe that a serious and demonstrable potentiality for danger exist[s]" to those at the arrest scene from another person in "the area to be swept"? *Buie*, 494 U.S. at 334, 336.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Hernandez, 806 Fed. Appx. 345 (5th Cir. 2020) (unpublished).

United States v. Hernandez, Case No. 6:18-CR-124-1 (S.D. Tex.).

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PRAYER

Petitioner Joe Hernandez respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on May 28, 2020.

OPINIONS BELOW

On May 28, 2020, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Hernandez's judgment of conviction and sentence. *See United States v. Hernandez*, 806 Fed. Appx. 345 (5th Cir. 2020) (unpublished). The Fifth Circuit's opinion is reproduced as an Appendix to this petition. The district court did not enter a written opinion.

JURISDICTION

On May 28, 2020, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment in this case. This petition is filed within 150 days after that date and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

In the courts below, the petitioner, Joe Hernandez, raised a Fourth Amendment challenge to a search of his entire home that was conducted by United States Marshals pursuant to “standard procedure” upon their entry to serve an arrest warrant. Mr. Hernandez argued that the “protective sweep” of his entire residence by the Marshals upon their entry violated the dictates of this Court’s decision in *Maryland v. Buie*, 494 U.S. 325 (1990). This case originated with Mr. Hernandez’s indictment for possessing a firearm subsequent to a felony conviction and was based on the firearm that was found during the Marshals’ protective sweep. Mr. Hernandez filed a motion to suppress evidence of that firearm, and the evidence adduced at the suppression hearing was the following.

On November 1, 2018, a task force of United States Deputy Marshals went to Mr. Hernandez’s residence to arrest him pursuant to a state arrest warrant. Before the arrest, a surveillance team had been watching the residence, which was a small two-story structure, and a deputy had called Mr. Hernandez’s place of work and learned that he was sick and would be absent from work for the rest of the week. A black Dodge pickup truck was in the driveway of Mr. Hernandez’s residence, and it had not been moved since the surveillance began. In addition, no one had come to or left the house during the surveillance.

Two of the five or six deputies went to the back door of the residence, and the other deputies went to the front door. One deputy established surveillance on the upstairs window to make sure that no one ambushed them, but she never saw any movement, shadows, or

anything else to indicate that anyone was present upstairs. Standard operating procedure for the task force is to search or “clear” the entire residence upon entry to see if other people are present, even if the person named in the arrest warrant is standing right at the door when the deputies enter.

A deputy knocked on the front door of the residence and announced: “U.S. Marshals with an arrest warrant.” After getting no response and knocking loudly again, the deputies attempted to breach the door with a battering ram. When the door did not open, the deputies in back attempted to breach the back door. The deputies in back heard noises inside as if the person inside were trying to barricade the door. As the deputies in front continued to try to open the front door, they heard a voice inside say: “Hold on. I’m coming.” The deputies responded by telling the person to open the door and that they were not going away. They could hear the person inside moving things at the front door.

Mr. Hernandez, who was within the residence, opened the front door a little bit, which allowed the deputies to open it the rest of the way. When the deputies entered, they observed objects that Mr. Hernandez had placed behind the front and back doors in an attempt to block them. Once inside the front door, the deputies encountered and handcuffed Mr. Hernandez, who had his hands in the air and was submissive and compliant. The deputies then searched the entire house, including the living room, dining room, kitchen, laundry room, and upstairs, to make sure no one else was there.

Two deputies who entered the house went up the staircase near the front door and discovered a bedroom to the right and a bedroom to the left at the top of the stairs. One

deputy entered the bedroom on the right, and the other deputy entered the bedroom on the left. The deputy who entered *the left bedroom* opened the closet to check for a person and discovered a semiautomatic firearm leaning against the closet wall and a circular magazine and 2 additional clips of ammunition within the closet. The deputy did not touch the gun, but it was secured later.

After the search and arrest, Mr. Hernandez asked one of the deputies to get him a shirt from upstairs, and the deputy complied. At the suppression hearing, two deputies opined that, if they had not done a protective sweep of the residence, they would have opened the bedroom closet to see if anyone was in it when the shirt was retrieved. One of those deputies did not say whether it was the right or left bedroom from which the shirt was retrieved, and the other deputy, who actually went upstairs to retrieve the shirt, stated that the bedroom from which *he retrieved the shirt* was the bedroom *on the right*.

At the end of the suppression hearing, defense counsel argued that the search of the upstairs bedroom closet where the firearm and the ammunition were found violated the Fourth Amendment because the bedroom was not adjacent to the area of arrest and because the deputies had no information that anyone else was within the residence. The government argued that the search was a valid protective sweep and that the inevitable discovery doctrine applied in any event. The court denied the motion to suppress, holding that the upstairs closet was a place adjoining the place of arrest and that the search of it thus was valid. The court did not make any ruling on the government's inevitable discovery claim.

On June 4, 2019, Mr. Hernandez entered a conditional plea of guilty to the

indictment, pursuant to a plea agreement that preserved his right to appeal the ruling on his motion to suppress. On September 30, 2019, the court sentenced Mr. Hernandez to serve 27 months in the custody of the Bureau of Prisons and a 2-year term of supervised release. The court also imposed a \$100 special assessment, but did not impose a fine.

On October 2, 2019, Mr. Hernandez timely filed notice of appeal. As noted at the outset, on appeal Mr. Hernandez argued that the protective sweep of his home violated the Fourth Amendment and the dictates of this Court's opinion in *Buie*. Although the Fifth Circuit recognized the correct standard from *Buie*, which required probable cause to believe that someone else on the premises posed a danger, it flouted that requirement by instead relying on Mr. Hernandez's pending criminal charges, prior criminal record, and past associations to affirm while minimizing the standard protective sweep procedure as mere subjective intent:

At issue is whether a team of Deputy U.S. Marshals was justified in conducting a protective sweep of the premises when they arrested Hernandez at his home pursuant to an arrest warrant. "The protective sweep doctrine allows government agents, without a warrant, to conduct a quick and limited search of premises for the safety of the agents and others present at the scene." *United States v. Mendez*, 431 F.3d 420, 428 (5th Cir. 2005). The Supreme Court has recognized the lawfulness of sweeps supported by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

The record indicates the marshals who approached Hernandez's residence had information that he was a gang member and were aware that he was accused of a violent break-in and had been previously charged with manslaughter. When they announced their presence, his response was to barricade his front and back doors. Although Hernandez subsequently chose to submit to the marshals, the district court did not err in finding these

circumstances sufficient to warrant a protective sweep. *Cf. United States v. Silva*, 865 F.3d 238, 242 (5th Cir. 2017). That marshals who testified at the motion hearing spoke of the sweep as “standard procedure” does not alter this, as subjective motivations are generally irrelevant to determining whether actions are reasonable under the Fourth Amendment. *See United States v. Wallen*, 388 F.3d 161, 167 (5th Cir. 2004). The Supreme Court has given weight to subjective intent in only “a very limited subset of [its] Fourth Amendment cases,” and no such case applies here. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

United States v. Hernandez, 806 Fed. Appx. 345, 345-46 (5th Cir. 2020) (unpublished) (parallel citations omitted). In other words, the Fifth Circuit affirmed the protective sweep based on Mr. Hernandez’s characteristics and affiliations alone in the absence of any finding or mention of any other “individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 334.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Fifth Circuit has entered a decision in conflict with this Court's decision in *Maryland v. Buie*, 494 U.S. 325 (1990), and the decisions of other lower courts.

A. Protective Sweeps Under *Maryland v. Buie*.

Under the Fourth Amendment, law enforcement officers with an arrest warrant may enter a person's home to arrest him. *See Steagald v. United States*, 451 U.S. 204, 224 (1981) (discussing *Payton v. New York*, 445 U.S. 573 (1980)). In *Maryland v. Buie*, 494 U.S. 325 (1990), the Court made clear that, "as an incident to the arrest the officers c[an], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. However, the Court limited any such protective sweep outside the area adjoining an arrest, stating: "Beyond that, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* The test to determine whether there is a reasonable belief of a threat of danger justifying a sweep of an area broader than the area "adjoining the place of arrest" is the test for reasonable suspicion in *Terry v. Ohio*, 392 U.S. 1 (1968). *See Buie*, 494 U.S. at 334. "[S]uch a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Id.* at 335 (footnotes omitted).

B. The Protective Sweep of Mr. Hernandez’s Entire Residence Was Not Justified under *Buie*.

Before turning to an explanation of why the Fifth Circuit’s opinion conflicts with *Buie* and the opinions of other lower courts, a brief discussion of why the protective sweep in this case cannot be justified under *Buie* is in order. The protective sweep of Mr. Hernandez’s left upstairs bedroom could only be justified if it was a “space[] immediately adjoining the place of arrest from which an attack could be immediately launched” or if there were “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 334. For the following reasons, neither alternative applies.

First, the bedroom up the stairs and to the left was not a “space[] immediately adjoining the place of arrest from which an attack could be immediately launched.” *Id.* The Tenth Circuit’s conclusion in *United States v. Bagley*, 877 F.3d 1151 (10th Cir. 2017), and the Sixth Circuit’s conclusion in *United States v. Archibald*, 589 F.3d 289 (6th Cir. 2009), show that the left upstairs bedroom is not a place immediately adjoining the place of arrest. In *Bagley*, the Tenth Circuit, assuming that the defendant had been arrested in the living room near the front door and not outside of it, “conclude[d] that the protective sweep did not fall within the first situation identified in *Buie*,” where law enforcement officers had searched the southeast bedroom down a hallway from the front door. *See Bagley*, 877 F.3d at 1155-56. In *Archibald*, the defendant was encountered on the threshold of his residence and then was grabbed and arrested outside. *Id.* at 297. The Sixth Circuit held that the

“protective sweep did not occur within the area immediately adjoining the arrest,” because “the officers swept not just the room ‘immediately adjoining’ the doorway, i.e., the living room, but also the kitchen and upstairs bedroom.” *Id.* at 298 (citations omitted). Like the facts in *Bagley* and *Archibald*, Mr. Hernandez was arrested just inside of his front door. *See supra* text, at 4. While there may have been some spaces downstairs that were immediately adjoining the place of arrest, a room all the way up at the top the stairs and to the left, like the bedrooms in *Bagley* and *Archibald*, was not a “space[] immediately adjoining the place of arrest.” *Buie*, 494 U.S. at 334.

Second, the search of the left upstairs bedroom cannot be justified on the ground that there were “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* In the present case, the task force, by way of its initial investigation and surveillance, knew that Mr. Hernandez was at home because he was off work for the week due to an illness, that no one had come to or left the premises, and that there was no indication that anyone was upstairs. *See supra* text, at 3-4. The deputies thus had no facts showing that anyone other than Mr. Hernandez was within the premises.

Without any knowledge that there was someone else in the residence who posed a danger, the deputies’ protective sweep cannot be justified. *See Buie*, 494 U.S. at 334. But, even assuming that “the government did not know for certain that no one else would be in [Mr. Hernandez]’s residence who might pose a danger,” the “[l]ack of information cannot

provide an articulable basis upon which to justify a protective sweep.’” *United States v. Delgado-Perez*, 867 F.3d 244, 256 (1st Cir. 2017) (quoting *United States v. Colbert*, 76 F.3d 773, 778 (6th Cir. 1996)). Moreover, when Mr. Hernandez opened the door, he was compliant and submissive, making the facts “even less likely to support a reasonable perception of danger.” *United States v. Roof*, 103 Fed. Appx. 652, 658 (10th Cir. 2004) (unpublished). Nor did the sounds inside the front door prior to the time Mr. Hernandez opened it, or any testimony about those sounds, show that there was more than one person inside or support a reasonable belief that someone else inside posed a threat to the deputies. *See Archibald*, 589 F.3d at 300. In sum, the sweep of the left bedroom on the second floor of Mr. Hernandez’s residence cannot be justified under *Buie*’s prong concerning a reasonable belief of danger. *See, e.g., id.* at 298-302; *United States v. Akrawi*, 920 F.2d 418, 420-21 (6th Cir. 1990).

C. This Court Should Grant Certiorari Because the Fifth Circuit’s Decision Conflicts with *Buie* and with Decisions of Other Lower Courts.

In the present case, the Marshals entered Mr. Hernandez’s house to execute an arrest warrant after he opened the door, and they immediately arrested him by the front door while he was holding his hands in the air and was being compliant. Acting pursuant to their standard operating procedure, the Marshals immediately searched the entire house for other people despite the fact that neither their surveillance nor their investigation revealed any evidence that anyone other than Mr. Hernandez was present in the residence. *See supra* text, at 3-4. The firearm that they found in an upstairs bedroom during this search was the basis of the prosecution in this case. *See id.*

While the Fifth Circuit’s opinion in this case recognized that this Court’s decision in *Buie* required the Marshals to have ““articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene,”” *see Hernandez*, 806 Fed. Appx. at 346 (quoting *Buie*, 494 U.S. at 334), in order to justify a protective sweep of the upstairs bedrooms, it flouted that requirement by minimizing the Marshals’ standard procedure as mere “subjective motivation.” *Id.* The Fifth Circuit’s opinion directly conflicts with this Court’s opinion in *Buie* and with the decisions of other lower courts.

In *Buie*, this Court made clear that a protective sweep, like the one done as a matter of standard procedure by the Marshals upon their entry in this case, *is not* constitutionally authorized: “The type of search we authorize today is far removed from the ‘top-to-bottom’ search involved in *Chimel*;^[1] moreover, *it is decidedly not ‘automatic,’* but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 336 (brackets omitted, and emphasis added). The Fifth Circuit’s refusal to recognize that the protective sweep performed automatically by the Marshals upon their entry into Mr. Hernandez’s residence was unconstitutional thus is in conflict with this Court’s opinion in *Buie*.

¹ *Chimel v. California*, 395 U.S. 752 (1969).

The Fifth Circuit’s opinion also is in conflict with the decisions of other lower courts. For example, the Sixth Circuit has made clear that “[t]he police cannot justify a sweep simply by citing their standard procedure.” *United States v. Taylor*, 666 F.3d 406, 409 (6th Cir. 2012). The Eighth Circuit also has made clear “that a protective sweep may not be conducted as a matter of course.” *United States v. Williams*, 577 F.3d 878, 881 n.3 (8th Cir. 2009). The Tenth Circuit, moreover, has expressly stated that “[t]he Fourth Amendment does not sanction automatic searches of an arrestee’s home, nor does the fact-intensive question of reasonable suspicion accommodate a policy of automatic protective sweeps.” *United States v. Nelson*, 868 F.3d 885, 892 n.5 (10th Cir. 2017) (quoting *United States v. Hawk*, 412 F.3d 1179, 1186 (10th Cir. 2005)); *see also United States v. Fadul*, 16 F. Supp. 3d 270, 291 (S.D.N.Y. 2014) (holding that “[t]he police cannot justify a protective sweep simply by citing prior experiences or by invoking standard procedure” and that “*Buie* clearly instructs that protective sweeps must be justified on an individualized basis”) (internal quotation marks and citations omitted).

In addition, the Fifth Circuit’s opinion conflicts with *Buie* and the decisions of other circuits because it relies on Mr. Hernandez’s characteristics and affiliations rather than on any evidence of probable cause to believe that there was another person in the area to be swept who posed a danger to those on the arrest scene. *Buie*, 494 U.S. at 334. The Fifth Circuit based its opinion on the fact that the Marshals “had information that [Mr. Hernandez] was a gang member and were aware that he was accused of a violent break-in and had been previously charged with manslaughter.” *Hernandez*, 806 Fed. Appx. at 346.

However, this rationale conflicts with the opinions of other circuits, which have pointed out that facts about the person to be arrested do not show that *some other person* is present and poses a danger. For example, the Fifth Circuit’s reliance on prior convictions and pending charges conflicts with the Tenth Circuit’s opinion in *United States v. Archibald*, 589 F.3d 289 (10th Cir. 2009), which rejected the argument that the defendant’s criminal record can justify a protective sweep:

Regarding the government’s first justification, in *United States v. Colbert*, 76 F.3d 773, 777 (6th Cir. 1996), we held that a defendant’s own dangerousness is not relevant in “determining whether the arresting officers reasonably believed that someone else inside the house might pose a danger to them[,]” as those facts reflected only the dangerousness of the arrested individual, not others. Thus, Archibald’s prior arrests for violent crimes were an “irrelevant” factor, which the district court should not have considered. *Id.*

Archibald, 589 F.3d at 298-99 (brackets in original).

And, the Fifth Circuit’s reliance on the pending charges involving “a violent break-in” is further in conflict with the Tenth Circuit’s opinion in *Archibald*, as the Tenth Circuit pointed out in that opinion that, in that case, “the two arrest warrants issued for Archibald were for probation violations, which neither party asserts involved accomplices, and therefore did not raise concerns that an accomplice might be present in Archibald’s apartment at the time of his arrest.” *Id.* The same is true here as the testimony showed that the warrant for Mr. Hernandez’s arrest charged that he broke into the residence where his girlfriend was staying and assaulted her. The Fifth Circuit’s reliance on the pending charges thus was in direct conflict with the Tenth Circuit’s opinion in this regard also because the

charges “did not raise concerns that an accomplice might be present in [Mr. Hernandez]’s [residence] at the time of his arrest.” *Id.*

The Fifth Circuit’s opinion relying on information about Mr. Hernandez’s gang affiliation is in conflict with opinions of other lower courts for similar reasons. As other courts have pointed out, the fact that a person has an affiliation with a person or a group does not show that another person or even an accomplice is present at the scene of the arrest. For example, the Tenth Circuit has rejected the government’s argument that a protective sweep was justified because the defendant had an accomplice in the crime, stating: “The fact that the officers had evidence that an accomplice was involved in the murder does not equate to evidence that some person would be hiding out in Hogan’s house a month after the event and that officer safety was threatened.” *United States v. Hogan*, 38 F.3d 1148, 1150 (10th Cir. 1994). The Fifth Circuit’s vague justification of a gang affiliation is even weaker than the evidence relied on by the government in *Hogan* and conflicts with the Tenth Circuit’s holding in that case. *See also United States v. Chalas-Felix*, 424 F. Supp. 3d 316, 327-28 (D. Del. 2019) (holding that protective sweep was not justified even though the homeowner said someone else was in her home because the officers had no information that the other person was a member of the drug trafficking organization).

The bottom line is that the Fifth Circuit’s opinion in this case conflicts with this Court’s opinion in *Buie* and with decisions of other lower courts because the evidence found in an upstairs bedroom of Mr. Hernandez’s residence and used in this case was

obtained during a protective sweep conducted by law enforcement officers as a matter of “standard procedure” upon their entry into the residence without “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 334. This Court, therefore, should grant certiorari.²

² In the Fifth Circuit, the government alternatively argued that the firearm would inevitably have been discovered when the Marshals retrieved a shirt from Mr. Hernandez’s bedroom with his purported consent. Mr. Hernandez contended that his consent to retrieve the shirt was unconstitutionally obtained because there was no attenuation between the unconstitutional protective sweep and his consent. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 601-02 (1975); *see also New York v. Harris*, 495 U.S. 14, 18-19 (1990). The Fifth Circuit did not address this issue because it found that the protective sweep was justified. This Court need not decide the consent/inevitable discovery issue, but instead may remand after resolving the questions presented, leaving the resolution of that issue to the Fifth Circuit. *See, e.g., Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017); *Skilling v. United States*, 561 U.S. 358, 414 (2010); *Rose v. Clark*, 478 U.S. 570, 582 n.12 (1986).


CONCLUSION

For the foregoing reasons, petitioner Joe Hernandez prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: October 2, 2020

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By 

H. MICHAEL SOKOLOW
First Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600