No. _____

In the

Supreme Court of the United States

RYAN DENNIS,
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.

Whether an offense that can be committed by recklessly causing serious injury has "the use of physical force against the person of another" as an element.

2.

Whether, after the Court of Appeals grants authorization to file a successive motion to vacate under 28 U.S.C. § 2255(h)(2) and *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court loses subject matter jurisdiction over the case if the movant fails to prove, by a preponderance of the evidence, that the sentencing judge subjectively "relied on" the ACCA's residual clause.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Ryan Dennis*, No. 4:08-CR-109 (N.D. Tex.)
2. *United States v. Ryan Dennis*, No. 09-10280 (5th Cir.)
3. *Ryan Dennis v. United States*, No. 09-10844 (U.S.)
4. *Ryan Dennis v. United States*, 4:11-CV-423 (N.D. Tex.)
5. *United States v. Ryan Dennis*, No. 12-10316 (5th Cir.)
6. *In re Ryan Dennis*, No. 16-10581
7. *United States v. Ryan Dennis*, No. 18-10025 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan Dennis asks this Court to issue 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 selected for publication. It can be found at 800 F. App'x 252 and is reprinted in the Appendix to this Petition.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on April 14, 2020. App, *infra*, 1a–6a, 7a. Mr. Dennis filed a timely petition for rehearing en banc on May 29, 2020. *See* Fed. R. App. P. 40(a)(1). The Fifth Circuit entered the order denying rehearing on June 15, 2020. App., *infra*, 8a.[1] On March 19, this Court extended the deadline to file certiorari to 150 days from the date of the order denying a timely petition for rehearing. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e); 28 U.S.C. § 2255; and 28 U.S.C. § 2244. The ACCA provides, in pertinent part:

[1] According to the Fifth Circuit's docket entry, the Court the order denying rehearing was "Entered: 06/15/2020 09:18 AM." The undersigned attorney received electronic notice of the denial at that time. Although the document itself asserts that it is "Dated: 6-13-2020," that might be a clerical error: June 13 was a Saturday. In any event, it is the "entry" of a judgment or decree that controls for purposes of the certiorari deadline. *See* S. Ct. R. 13.3; 28 U.S.C. § 2101(c).

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * *

(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—

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

(ii) 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)(1), (2)(B). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Court struck down the italicized portion of the statute as unconstitutionally vague.

28 U.S.C. § 2255 provides:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United

States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(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.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(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. § 2244 provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) 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.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ

> of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.
>
> (d)
>
> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Texas defines "assault" at Texas Penal Code § 22.01(a), and defines "aggravated assault" at Texas Penal Code § 22.02(a). Those statutes provide, in pertinent part:

> Sec. 22.01. ASSAULT. (a) A person commits an offense if the person:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
>
> (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
>
> (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative. [. . .]
>
> Sec. 22.02. AGGRAVATED ASSAULT. (a) A person commits an offense if the person commits assault as defined in Sec. 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.

INTRODUCTION

As a preliminary matter, Mr. Dennis will ask the Court to hold this petition until the Court decides *Borden v. United States*, 140 S. Ct. 1262 (2020) (Case No. 19-5410). This Court has held several other cases where the petitioner's ACCA sentence depended upon whether Texas aggravated assault remains a violent felony without the ACCA's residual clause. *See*, e.g., *Combs v. United States*, No. 19-5908 (direct appeal); *Medina v. United States*, No. 19-8838 (successive § 2255 motion). If *Borden* prevails, then it will mean that Mr. Dennis's ACCA sentence is likewise illegal and unconstitutional. Texas aggravated assault is nearly identical to the Tennessee statute at issue in *Borden*, and it can be committed by recklessly causing serious bodily injury or recklessly causing injury by use of a deadly weapon. Those two

aggravating circumstances are alternative means of proving a single offense. *Landrian v. State*, 268 S.W.3d 532, 533 (Tex. Crim. App. 2008).

The bulk of the petition assumes that *Borden* will show that the ACCA sentence is illegal after *Johnson*. If so, then the text of 28 U.S.C. § 2255 plainly calls for relief: Mr. Dennis sought and obtained prefiling authorization from the Court of Appeals to raise his *Johnson*-based claim. 28 U.S.C. § 2255(h); App., *infra*, 10a–11a. The Government did not raise any procedural defenses at all, arguing only that the Fifth Circuit's "recent precedent" showed that Texas aggravated assault was categorically violent under the ACCA's elements clause. The district court likewise denied the case on the merits, without addressing any alleged procedural problems. App. 12a–14a. The Fifth Circuit then granted a certificate of appealability on the merits—that is, "on whether, after *Johnson*, Dennis no longer qualifies for sentencing under the ACCA based on his convictions of Texas aggravated assault and whether relief in a successive § 2255 proceeding is therefore warranted." App., *infra*, 15a.

But the panel who decided the appeal disregarded all prior work on the case. Relying on the Fifth Circuit's dubious decisions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019), the Court *sua sponte* decided that Mr. Dennis had not done enough to *prove* that the original sentencing judge subjectively "relied on" the ACCA's residual clause. The Fifth Circuit changed the district court's "denial of Dennis's successive § 2255 to a dismissal on the ground that it lacked jurisdiction" and then affirmed its modified judgment.

The so-called "jurisdictional" limitation applied here is absent from the text of 28 U.S.C. § 2255, and it does not exist in other circuits. Mr. Dennis did everything he needed to do to secure a merits ruling, and he is entitled to appellate review of that merits ruling.

STATEMENT OF THE CASE

In 2008, a jury convicted Petitioner Ryan Dennis of possessing a firearm after felony conviction. App., *infra*, 1a. The default statutory maximum for that offense is ten years in prison, *see* 18 U.S.C. § 924(a)(2), but the Government successfully urged the district court to impose the ACCA enhancement, 18 U.S.C. § 924(e)(1). That raised the minimum penalty to 15 years in prison, *id.*, and the district court sentenced him to 24 years in prison. App., *infra*, 2a.

Mr. Dennis had prior Texas convictions for aggravated assault committed on three different occasions: February 1996; July 20, 2004; and July 23, 2004. App., *infra*, 4a. Without consulting the relevant state court documents, the sentencing court imposed the ACCA over his objection and the Fifth Circuit affirmed. *See United States v. Dennis*, 365 F. App'x 591 (2010). He did not argue that Texas aggravated assault was not a violent felony, because the residual clause was still in place in 2009 when the court imposed sentence and in 2010 when the Fifth Circuit affirmed. *See James v. United States*, 550 U.S. 192 (2007). A previous attempt at collateral attack failed.

Once this Court struck down the residual clause in *Johnson*, 135 S. Ct. 2551, Mr. Dennis had a plausible claim for post-conviction relief. The Fifth Circuit granted authorization to file a successive motion challenging his ACCA sentence. App., *infra*,

10a–11a. The authorization order acknowledged his contention that the ACCA sentence "appears to be based upon *Johnson* error because all of his prior Texas convictions for aggravated assault under Tex. Penal Code § 22.02 could only be violent felonies under the residual clause." App. 11a.

The Government raised no procedural defenses to the authorized motion. Nor did it invoke the gatekeeping procedure applicable to successive habeas corpus petitions, 28 U.S.C. § 2244(b)(4), which some courts (including the Fifth) have held applicable to successive § 2255 motions. The Government chose to defend the case solely on the merits under current Fifth Circuit law. 5th Cir. R. 157–172. The Government simply contended that all forms of Texas aggravated assault—including recklessly causing serious injury or recklessly causing injury using an item that was capable of causing serious bodily injury—were categorically violent. The district court ultimately agreed: after applying current Fifth Circuit and Supreme Court law, the court held "that the aggravated assault convictions all remained violent felonies after *Johnson*." App., *infra*, 14a.

The Fifth Circuit granted a certificate of appealability "on whether, after *Johnson*, Dennis no longer qualifies for sentencing under the ACCA based on his convictions of Texas aggravated assault and whether relief in a successive § 2255 proceeding is therefore warranted." App., *infra*, 16a. Both parties fully briefed the merits of the issue, relying on current Fifth Circuit and Supreme Court precedent.

After all that work—a grant of authorization, a fully litigated merits decision in district court, issuance of a COA, and full appellate briefing—the Fifth Circuit *sua*

sponte raised an issue that "the Government d[id] not address in any detail in its briefing and the district court did not address . . . directly." App., *infra*, 2a. Rather than deciding the case as framed by the parties and the Court below, the panel decided to invoke § 2244(b)(4), the district court gatekeeping standard. App., *infra*, 2a. The Fifth Circuit has held that the district court must perform a separate gatekeeping analysis under § 2244 even after the Court of Appeals grants authorization, has deemed the substantive gatekeeping requirements "jurisdictional," and has held that this requires requires a *Johnson*-based movant to prove, by a preponderance of the evidence, that the sentencing court relied on the ACCA's residual clause. App., *infra*, 2a–3a. Relying on charging documents and precedent that were not available to the sentencing judge, the Fifth Circuit decided that Mr. Dennis could not satisfy his extra-statutory "jurisdictional" burden. The court modified the district court's judgment to reflect that the case was dismissed for lack of subject matter jurisdiction. App. 5a–6a.

Mr. Dennis petitioned the full Court for rehearing en banc. He argued that the panel decision conflicted with this Court's decision in *Gonzalez v. Thaler*, 565 U.S. 134 (2012), and with Sixth Circuit's decision in *Williams v. United States*, 927 F.3d 427 (6th Cir. 2019). The court denied rehearing. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT CAUSING INJURY IS NOT SYNONYMOUS WITH THE USE OF PHYSICAL FORCE.

This Court will decide whether recklessly causing serious injury is a "use of physical force against" the victim, for purposes of the ACCA, in *Borden*. The Court

should hold this petition pending a decision in *Borden*, but then proceed to resolve the second question presented.

A. Under *Leocal*, causation of injury is not the same thing as a use of physical force against a victim.

In 2004, this Court held that a Florida offense defined as "causing serious bodily injury" to another while "driving under the influence of alcohol" did not "have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (quoting Fla. Stat. § 316.193(c)(2) & 18 U.S.C. § 16(a)). For many years, the Fifth Circuit likewise acknowledged the "difference between a defendant's causation of an injury and the defendant's use of force." *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc). But the Fifth Circuit recently reversed course in *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (en banc) ("It is high time for this court to take a mulligan on [crimes of violence]."). The court stated in a footnote that it would rely on on its newly minted violent-crime jurisprudence to affirm here, if it found jurisdiction. App., *infra*, 5a n.4 (citing *Combs*).

B. This Court has already granted certiorari to decide whether reckless causation of injury is a use of physical force against the victim.

"*Leocal* reserved the question whether a reckless application of force could constitute a 'use' of force." *United States v. Castleman*, 572 U.S. 157, 169 n.8 (2014) (citing *Leocal*, 543 U.S. at 9). But all of the lower courts to consider the question—including the Fifth Circuit—"held that recklessness is not sufficient." *Id.* (citing *United States v. Palomino Garcia*, 606 F.3d 1317, 1335–1336 (11th Cir. 2010);

Jimenez-Gonzalez v. Mukasey, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615–616 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127–1132 (9th Cir. 2006) (en banc); *Garcia v. Gonzales*, 455 F.3d 465, 468–469 (4th Cir. 2006); *Oyebanji v. Gonzales*, 418 F.3d 260, 263–265 (3d Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); and *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)).

That unanimity disappeared after this Court decided *Voisine v. United States*, 136 S. Ct. 2272 (2016). In *Voisine*, this Court interpreted a similar elements clause found in the definition of "misdemeanor crime of domestic violence," 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9). "That provision, unlike the one here, requires only a 'use . . . of physical force' period, rather than a use of force 'against the person of another.'" *Walker v. United States*, 931 F.3d 467, 468 (6th Cir. 2019) (Kethledge, J., dissenting from denial of reh'g). This Court held—for purposes of MCDV—that a "person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally." *Voisine*, 136 S. Ct. at 2280. Excluding recklessness would "render[ ] § 922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness." *Id.* (assuming that the relevant crimes are indivisible).

After *Voisine*, the lower courts are sharply divided over whether reckless injury crimes count as a *use* of force *against* a victim. In the First, Fourth, Eighth, and Ninth

Circuits, reckless-injury crimes do not count because they do not have *use* of physical force *against* the victim as an element. *See 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. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018) (discussing *United States v. Middleton*, 883 F.3d 485, 500 (4th Cir. 2018) (Floyd, J., concurring in the judgment and joined by Harris, J.)); *United States v. Begay*, 934 F.3d 1033, 1038–1041 (9th Cir. 2019).

The Fifth Circuit disagreed. The court has held that *Reyes-Contreras* and *Voisine* "confirm that reckless conduct constitutes the 'use' of physical force under the ACCA, and that the distinction between causing an injury and the use of force is no longer valid." *United States v. Burris*, 920 F.3d 942, 952 (5th Cir. 2019). The Court has applied this reasoning to hold that all forms of Texas aggravated assault—including the recklessly causing serious injury—are categorically violent under the elements clause. The Sixth, Tenth, and District of Columbia Circuits have also held that recklessness is enough. *See Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018); *United States v. Pam*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018); *United States v. Haight*, 892 F.3d 1271, 1280–1281 (D.C. Cir. 2018) (Kavanaugh, J.).

This Court will likely resolve that question in *Borden v. United States*, No. 19-5410. The Court has held the certiorari petitions in *Combs* and *Medina* to await the outcome of *Borden*. At a minimum, then, it seems appropriate to hold this petition until *Borden* is decided.

C. Texas assaultive crimes reach conduct that involves neither physical contact nor use of violent physical force.

Even though "*Leocal* reserved" the question of whether recklessly causing injury was a use of force against the injured person, the decision provided a roadmap for resolving the issue.

1. *Leocal* rejected the argument that a drunk-driver who causes a collision has *used* physical force *against* the victim or the victim's property. This conclusion was based upon an analysis of the plain meaning of the statutory terms "use" and "against": a person would "'use physical force against' another when pushing him; however, we would not ordinarily say a person 'uses physical force against' another by stumbling and falling into him." 543 U.S. at 9 (alterations omitted).

2. There is little or no daylight between an intoxicated driver and a reckless driver. Aggravated assault—like most other Texas assaultive crimes—is a "result-oriented offense." *Landrian*, 268 S.W.3d at 533; *McCrary v. State*, 327 S.W.3d 165, 175 (Tex. App. 2010) ("Both [aggravated assault and aggravated robbery] are result-oriented crimes with injury being the result."). Because Texas defines aggravated result by its *result*, "[t]he precise act or nature of conduct in this result-oriented offense is inconsequential." *Landrian*, 268 S.W.3d at 537.

Texas defines recklessness in a way that surely includes most, if not all, drunk-driving accidents:

> (c) A person acts recklessly, or is reckless, with respect to . . . the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that . . . the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care

> that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Texas Penal Code § 6.03(c). In *United States v. Vargas-Soto*, 700 F.3d 180 (5th Cir. 2012), the court analyzed a Texas prosecution where a single drunk-driving accident resulted in a conviction for reckless manslaughter. *Id.* at 184.

3. In *Leocal*, this Court relied on Congress's decision to include both drunk-driving accidents and "crimes of violence" under the broader heading of "serious criminal offense" within the Immigration and Nationality Act. *Leocal*, 543 U.S. at 12 (discussing 8 U.S.C. § 1101(h)). The statute in question also lists *reckless driving* offenses that cause injury:

> For purposes of section 1182(a)(2)(E) of this title, the term "serious criminal offense" means--
>
> (1) any felony;
>
> (2) any crime of violence, as defined in section 16 of Title 18; or
>
> (3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

8 U.S.C. § 1101(h). If—as the Fifth Circuit held and Respondent now argues—recklessly caused injuries were, by definition, a use of physical force against the victim, then those crimes would be violent under 18 U.S.C. § 16(a). "[T]he distinct provision for" reckless-driving-injury offenses under [§ 1101(h)] should "bolster[ ]" Petitioner's argument that the use-of-force clause "does not itself encompass" reckless-injury offenses. *Leocal*, 543 U.S. at 12 & n.9.

4. There is a non-trivial linguistic difference between "using physical force" and causing physical injury. *Leocal* acknowledged the difference. 543 U.S. at 10–11 & n.7. Section 16(b), this Court reasoned "plainly does not encompass all offenses which create a 'substantial risk *that injury will result from a person's conduct*.'" *Id.* at 10 n.11 (emphasis added). Congress used both *injury* and *force* within § 924 itself, which suggests it intended a different meaning. *Compare* § 924(c)(3)(A), (c)(3)(B), (e)(2)(B)(i), *with* § 924(e)(2)(B)(ii). Within ACCA's elements clause, Congress specified that *use of force* must be an element of the offense. Surely Congress did not believe that language would extend to all statutes defined by causing injury.

5. "Even if" the ACCA "lacked clarity on this point," this Court "would be constrained to interpret any ambiguity in the statute in petitioner's favor." *Leocal*, 543 U.S. at 12 n.8. ACCA, like § 16, "is a criminal statute," and "the rule of lenity applies." *Id.* ACCA's elements clause is not merely *susceptible* to an interpretation that excludes recklessly caused injuries; that was the universally accepted meaning prior to *Voisine*.

6. Texas courts have affirmed convictions for aggravated assault where an offender's reckless driving caused bodily injury. Texas defines "deadly weapon" under "the broadest possible understanding in context of which it was reasonably susceptible in ordinary English." *Tyra v. State*, 897 S.W.2d 796, 797 (Tex. Crim. App. 1995). A recklessly driven automobile is a deadly weapon, even if the defendant did not intend to use the car as a weapon. *Walker v. State*, 897 S.W.2d 812, 814 (Tex. Crim. App. 1995).

In *Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156 (Tex. App.—Dallas Nov. 27, 2013), the court held that the defendant committed aggravated assault because (a) he recklessly drove a motor vehicle, (b) his reckless driving caused injury to the victim, and (c) the manner he drove the car made it a "deadly weapon," because it was "capable" of causing death or serious bodily injury to the victim. Similarly, the court in *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App. Nov. 23, 2011), held that a 76-year old defendant would be guilty of aggravated assault if he "failed to properly control his vehicle" as he attempted to drive past a line of striking picketers into work.

7. Texas courts have also convicted defendants of aggravated assault for transmitting a virus during consensual sexual intercourse. Use of physical force "is not an element" of crimes "prohibiting consensual sexual contact with" a victim. *United States v. Houston*, 364 F.3d 243, 246 (5th Cir. 2004). But Texas has prosecuted and convicted defendants for aggravated assault where such consensual conduct passed a virus to the unwitting victim. Sometimes, prosecutors and courts relied on the "serious bodily injury" aggravator. *See*, *e.g.*, *Billingsley v. State*, No. 11-13-00052-CR, 2015 WL 1004364, at *2 (Tex. App. – Eastland 2015, pet. ref'd) (affirming aggravated assault conviction because the defendant "caused serious bodily injury to [the victim] by causing [the victim] to contract human immunodeficiency virus (HIV)"). Other times, prosecutors charge the "deadly weapon" alternative. *See, e.g., Padieu v. State*, 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. App.—Dallas Dec. 30, 2010, pet. ref'd) ("Philippe Padieu was indicted on six charges of aggravated

assault with a deadly weapon for intentionally, knowingly, and recklessly causing six women serious bodily injury by exposing them to the HIV virus through unprotected sexual contact. A jury convicted appellant on all charges and assessed punishment, enhanced by a prior felony conviction, at forty-five years in prison in five cases and twenty-five years in prison in the sixth case.").

In *State v. Zakikhani*, Case No. 1512289 (Crim. Dist. Ct. No. 176, Harris Co., Tex. June 20, 2018), Texas again convicted a defendant of aggravated assault for transmitting HIV through consensual intercourse. One complainant made clear that the *actus reus* was *not* physically forceful: during the time she and the defendant were intimate, he was "friendly, charming, outgoing," and he cared for her and her child. Tera Robertson, *Man may be knowingly infecting victims with HIV, police say*, Click2Houston.com, June 9, 2016, available at: https://www.click2houston.com/news/investigates/man-may-be-knowingly-infecting-victims-with-hiv-police-say (accessed Oct. 30, 2018).

8. Texas prosecutors have charged another defendant with aggravated assault based solely on social media activity. *See* Indictment, *State v. Rivello*, Case No. F-1700215-M (Crim. Dist. Ct. No. 5, Dallas Co., Tex.); *see also* Indictment, *State v. Rivello*, Case No. F-1900747 (Crim. Dist. Ct. No. 4, Dallas Co., Tex.). According to the allegations in that case, the Maryland-based defendant sent the Texas-based victim an animated or flashing strobe image through Twitter, and the victim later suffered a seizure when he saw that image. These allegations do not suggest any

"use" of "physical force," at least under the commonly accepted meaning of those terms.

9. While these non-forceful ways to commit the crime arise under both prongs of the aggravated assault statute, it is also worth noting that the crime is not divisible. Intentionally using a deadly weapon and recklessly causing serious bodily injury are alternative *means* of committing a single offense, about which the jury need not agree. Texas and federal law are clear on this point. *See Landrian*, 268 S.W.3d at 537; *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016); *United States v. Barcenas-Yanez*, 826 F.3d 752, 754 (4th Cir. 2016) ("In a holding imbued with . . . unmistakable clarity, the Texas Court of Criminal Appeals has determined that jury unanimity as to mens rea is not required for an aggravated assault conviction under § 22.02(a)(1), (2).").

Thus, if this Court holds, in *Borden*, that recklessly causing injury is not a use of physical force against the victim, then the Court should grant the petition here and vacate the Fifth Circuit's decision. Texas aggravated assault is nearly identical to the statute at issue in *Borden*.

II. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE LOWER COURTS' CONFLICT OVER SO-CALLED "JURISDICTIONAL" GATEKEEPING REQUIREMENTS FOR AUTHORIZED SUCCESSIVE MOTIONS UNDER 28 U.S.C. § 2255.

The lower courts are hopelessly divided over how district courts should analyze and apply the "gatekeeping" standards found in 28 U.S.C. § 2244(b) after the Court of Appeals has authorized the filing of a successive § 2255 motion. Courts disagree about whether these requirements are *jurisdictional*, and they disagree about *what*

burden a movant must satisfy to pass through the second "gate." The conflicts are acknowledged and outcome-determinative in this case. According to filings made in other cases, the Solicitor General actually agrees that the district-court gatekeeping standards are non-jurisdictional, and that would be enough to change the outcome for Mr. Dennis. But even after Mr. Dennis informed the Fifth Circuit of the Government's position, the Court persisted. App., *infra*, 3a n.3.

A. The lower courts are hopelessly divided.

Federal post-conviction review of *state court* convictions and sentences differs markedly from post-conviction review of *federal* convictions and sentences. State court prisoners must file a petition for habeas corpus, and they must jump through all manner of hoops arising from statutory and constitutional limitations on federal courts' interference with the business of state courts. Among those hoops is a series of procedures required where the offender seeks to file a second or successive federal habeas corpus petition. *See* 28 U.S.C. § 2244(b). He must secure prefiling authorization from the Circuit Court that his proposed petition "relies on" either new evidence or a new, retroactive rule of constitutional law, and once he does so, he must also convince the *district court* that his motion satisfies § 2244.

Federal prisoners have it (a little) easier. Section 2255 provides more authority for federal courts to tinker with final federal convictions and sentences than the courts would have under habeas corpus alone. But the statute contains a similar pre-filing authorization requirement for "second or successive" motions, 28 U.S.C. § 2255(h). Before filing a second or successive motion, the federal prisoner's proposed

motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" either new evidence of innocence 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). The Circuit courts appear to agree that this scheme contemplates a second review in the district court similar to § 2244(b)(4), even though that is not required by statute. But they don't agree on much else.

1. The Circuits are divided over whether the substantive requirements for a successive motion are "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 "dras-tic" consequences to limits Congress has enacted.

Id. (citations omitted).

The decision below, though consistent with existing Fifth Circuit precedent, violates every one of those admonitions. The Fifth Circuit considers the § 2244 gatekeeping analysis to be "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.").

But the Sixth Circuit has held that the substantive standards are non-jurisdictional. After hearing detailed argument about jurisdiction (including the Government's concession that this was merely a claims-processing requirement), the Sixth Circuit recognized "that the substantive requirements of § 2255(h) are nonjurisdictional." *Williams*, 927 F.3d at 434. Like Mr. Dennis, 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 for securing a ruling in district corut.

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 from the Court of Appeals (e.g., one that authorizes a motion that 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 argument that § 2244(b)(4) somehow gives rise to a jurisdictional requirement of "post-authorization vigilance." *Id.* at 438. Section 2255

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.).

For its part, the Government agrees with Petitioner on this point. *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). Petitioner's counsel assumes that Respondent will say so in this proceeding, too.

2. The Circuits are also divided over the burden an authorized successive movant must meet at the district-court gatekeeping stage.

The split regarding the gatekeeping burden is entrenched and acknowledged. *See Clay*, 921 F.3d at 554 ("The circuits are split on this issue."). In the Third, Fourth, and Ninth Circuits, a federal prisoner satisfies his gatekeeping burden if he shows that the sentencing court *might have* relied on the ACCA's residual clause. *United States v. Peppers*, 899 F.3d 211, 216 (3d Cir. 2018); *United States v. Geozos*, 870 F.3d

890, 895–896 (9th Cir. 2017); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017).

The First, Fifth, Eighth, Tenth, and Eleventh Circuits have all embraced a *stricter* approach to the gatekeeping standard. In these circuits, a successive movant has to *prove*, by a preponderance of the evidence, that the sentencing court was *actually thinking about* ACCA's residual clause when imposing the sentence. *See, e.g., United States v. Clay*, 921 F.3d at 559; *Dimott v. United States*, 881 F.3d 232, 240, 243 (1st Cir. 2018); *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018); and *Snyder v. United States*, 871 F.3d 1122, 1128 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–1222 (11th Cir. 2017) (emphasis added).

This Court is the only one who can resolve this dispute.

B. These conflicts deserve resolution.

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)). But the Fifth Circuit's strict application of the gatekeeping standard, which that court classifies as "jurisdictional," finds no support in any statute, much less a clearly jurisdictional statute. Left undisturbed, the Fifth Circuit will continue to refuse to exercise jurisdiction over post-conviction challenges that Congress has plainly provided. This case typifies the "drastic" consequences that flow from mislabeling a requirement as jurisdictional. *See Gonzalez*, 565 U.S. at 141.

1. The Fifth Circuit's rule leads to exactly the kind of waste this Court warned about in *Gonzales*: "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).

Consider all the work the Fifth Circuit threw away: a three-judge panel of that court granted pre-filing authorization, App., *infra*, 10a–11a; the parties and the district court labored over the case for more than a year and a half, with the court issuing a merits decision, App., *infra*, 12a–14a, that should be subject to review in light of *Borden*; a Fifth Circuit judge granted a certificate of appealability, recognizing that the merits decision was debatable, App., *infra*, 15a–16a; and then the parties *fully briefed* the merits before a full panel.

2. The Fifth Circuit rule also represents an unacceptable departure from the party presentation principle. That principle demands that courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). But that's not what happened here. The Fifth Circuit substituted an extra-statutory requirement—that Mr. Dennis somehow "prove" "by a preponderance of the evidence" that the sentencing court "relied on" the ACCA's residual clause. Because he could not prove that "fact" to the panel's satisfaction—never mind the fact that the Government had never requested such proof—the panel threw all the previous work and changed the outcome to a dismissal. App., *infra*, 5a–6a. Here, as

in *Sineneng-Smith*, the panel's "takeover of the appeal" was an abuse of discretion. 140 S. Ct. at 1581.

3. Given the drastic consquences attached to the "jurisdictional" label, this Court requires a *clear statement* from Congress: "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 *Wiese-Clay* standards as jurisdictional. Indeed, it is not clear that Congress requires defendants to prove *anything* about a sentencing court's "reliance" or "mindset." Section 2255(h) asks only whether the successive motion "*contains"* the right kind of rule. (Emphasis added).

4. *Gonzalez* analyzed a nearly identical statutory limitation and decided that it was nonjurisdictional. 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. The Court held that the defect was not jurisdictional. 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:

> 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 Mr. Dennis's favor.

Like the COA statute, the pre-filing authorization statute 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 operates just like the issuance of a COA—once secured, the reviewing court gains jurisdiction to decide the case.

5. The *Wiese-Clay* inquiry is difficult, unpredictable, and inconsistent with this Court's postconviction jurisprudence. There is no reason to give it jurisdictional significance. The Fifth Circuit has held that the *movant* cannot rely on intervening decisions, even substantive ones, 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 defendant *can* rely on new, non-constitutional substantive rules 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.).

6. This Court held in *James* that the application of the ACCA's residual clause was a question of *statutory interpretation*, not an "judicial factfinding." *James*, 550 U.S. at 213. So it is hard to believe that the same court would later have to find facts *about what it was thinking about* when trying to decide whether an ACCA sentence is illegal or unconstitutional. The better view is that a defendant is entitled to collateral relief under *Johnson* if his ACCA sentence would be lawful with the residual clause but unlawful without it.

6. Even if the Fifth Circuit were right—a movant must "prove" by a preponderance of the evidence that the sentencing court "relied on" the ACCA's residual clause, and this requirement is "jurisdictional"—this Court would still need to grant certiorari to ensure that this extra-statutory requirement were applied

equally throughout the nation. It makes no sense to condition the availability of post-conviction relief on the accident of geography.

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) invites or allows the *Wiese-Clay* focus on the historical question of what the sentencing judge was thinking about, the inquiry is non-jurisdictional.

C. The second question presented is outcome-determinative.

If the gatekeeping inquiry is not jurisdictional, then the Government forfeited or waived it by not raising it in district court or in the Court of Appeals. The Court should send the case back to be decided *as framed by the parties*. If the gatekeeping requirement is jurisdictional, but only requires proof that the sentencing court *might have* relied on the residual clause, Mr. Dennis can clear that burden easily. What he cannot do is prove—to the Fifth Circuit's satisfaction—that the sentencing court was factually relying on the ACCA's residual clause.

CONCLUSION

Mr. Dennis asks that this Court hold the petition pending a decision in *Borden*, then grant the petition and set the case for a decision on the merits.

Respectfully submitted,

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