No. 20-6356

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

REPLY BRIEF FOR PETITIONER

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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*, 576 U.S. 591 (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.

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Petitioner Ryan Dennis raises two questions that have divided the circuits. The Government resists review in this case, arguing that the Fifth Circuit "did not reach" the recklessness question and that the Court should ignore the entrenched conflicts over the "gatekeeping" question. (Opp. 2–3). Both contentions are wrong.

I. THE FIFTH CIRCUIT PASSED UPON, AND REJECTED, PETITIONER'S RECKLESSNESS ARGUMENT.

The first question presented has divided the circuits, and this Court has twice granted certiorari to resolve it. The first case, *Walker v. United States*, 140 S. Ct. 519 (2019) (No. 19-373), arose in the context of collateral review under 28 U.S.C. § 2255. After the Petitioner in *Walker* passed away, 140 S. Ct. 953 (2020), this Court granted certiorari in a direct-appeal case, *Borden v. United States*, 140 S. Ct. 1262 (2020) (No.19-5410) (argued Nov. 3, 2020). The Government does not dispute that the Texas

aggravated assault statute at issue here is materially identical to the Tennessee statute in *Borden*. This Court will (presumably) settle that longstanding dispute in the coming days or weeks.

Normally, this Court would hold the present petition until *Borden* is decided. The Government urges the Court not to follow the normal procedure because, in its view, the Fifth Circuit "did not reach" the first question presented. That view is wrong. Mr. Dennis pressed the recklessness question in the courts below, and the Fifth Circuit passed upon it. If not for *Borden* (and a host of other cases presenting the question under collateral and direct review), this Court could grant certiorari here to settle that dispute.

As the Fifth Circuit recognized, Mr. Dennis argued "that his prior Texas aggravated assault convictions are not violent felonies because assault . . . can be committed with recklessness as opposed to specific intent to use force." (Pet. App. 4a). The Fifth Circuit explicitly passed upon and rejected that argument: "If we did have jurisdiction, we would affirm the district court on the merits." (Pet. App. 5a n.4). Given that the issue was both pressed and passed upon below, there is no barrier to review in this Court. *Cf. United States v. Williams*, 504 U.S. 36, 43 (1992) ("There is no doubt in the present case that the Tenth Circuit decided the crucial issue . . .").

While this case was pending in the Fifth Circuit, that court declared a "mulligan" on its elements-clause jurisprudence and changed sides in the recklessness debate. (Pet. 12–14) (discussing *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (en banc)). The court then held that Texas aggravated

assault was categorically a violent felony, even without the ACCA's residual clause. *See*, e.g., *United States v. Combs*, 772 F. App'x 108, 109 (5th Cir. 2019). Relying on those decisions, the Fifth Circuit held that it would reject Mr. Dennis's claim on the merits. (Pet. App. 5a n.4) (citing *Combs*).

This Court has held numerous other petitions challenging the Fifth Circuit's recklessness jurisprudence to await the outcome in *Walker*, and, later, to await the outcome in *Borden*. *See*, e.g., *Combs v. United States*, No. 19-5908 (pet. filed Sept. 9, 2019); *Burris v. United States*, No. 19-6186 (pet. filed Oct. 3, 2019); *Powell v. United States*, No. 19-7684 (pet. filed Feb. 13, 2020); *Lister v. United States*, No. 20-6225 (pet. filed Nov. 2, 2020). Recognizing this, Mr. Dennis first asked this Court to hold the petition pending a decision in *Borden*. (Pet. 30). He still contends that is appropriate here. The Government's contrary argument is belied by footnote 4.

II. IF THE FIFTH CIRCUIT DID NOT REACH THE RECKLESSNESS QUESTION, THEN THERE IS NO BARRIER TO IMMEDIATE REVIEW OF THE GATEKEEPING QUESTION.

Mr. Dennis raised the recklessness question first because this Court had already granted review of the question, and because the Court had already held other, similar petitions to await the outcome of *Borden*. He agrees that there was another, primary basis for the Fifth Circuit's decision—that court's *sua sponte* invocation of "gatekeeping" standards for successive motions under § 2255.

It seems appropriate to wait until the first question is resolved before addressing the second. But if the Court agrees with the Government that (notwithstanding footnote 4) the Fifth Circuit did not reach the recklessness question,

then there is no barrier to immediate review of the gatekeeping question. The Court should grant review now, without waiting for *Borden*.

The Fifth Circuit's gatekeeping ruling encompassed two dubious propositions:

> (a) that a federal prisoner seeking relief under 28 U.S.C. § 2255(h)(2) and *Johnson*, must prove—by a preponderance of the evidence—that his sentencing judge subjectively "relied on" the Armed Career Criminal Act's residual clause when applying the ACCA enhancement (Pet. App. 3a); and
>
> (b) that this non-statutory requirement goes to the lower courts' subject-matter jurisdiction, and thus the Court of Appeals must raise the issue "sua sponte" even if the Government and the district court "did not address it" (Pet. App. 2a).

The lower courts have taken divergent positions on both propositions, and lower courts will continue to engage in inconsistent, irreconcilable, and irrational analysis of 28 U.S.C. § 2255(h) claims until this Court resolves the debate. That day should come sooner, rather than later, and this case presents a strong vehicle to settle the disputes.

This is a good vehicle to resolve the confusion over gatekeeping. To win here, the Government has to win on *both* of those propositions. (It doesn't even defend the second). If (as two circuits have held) it is enough to prove that the sentencing judge *might have* relied on the ACCA's residual clause, Mr. Dennis can do that. If (as another circuit has held) these gatekeeping requirements are non-jurisdictional, then Mr. Dennis will prevail because the Government waived any gatekeeping or "historical fact" arguments in the lower courts. (Pet. App. 2a–3a). And if (as Mr. Dennis contends, and as this Court has repeatedly held) all "historical facts" are irrelevant to the ACCA, then most of the lower courts have gotten this issue

completely wrong. Under that view, a prisoner need not even show that his sentencing judge "might have" relied on the residual clause. Instead, he could satisfy § 2255(h)(2) by showing that his sentence was authorized by the residual clause but is unlawful without it. Whichever approach is the right one, it will take a decision from this Court to ensure that all lower courts are performing the "gatekeeping" analysis properly.

A. The ACCA "does not care about" historical facts.

The Government asserts that Mr. Dennis must prove—as "a matter of 'historical fact'"—"that his sentence was based on the now-invalid residual clause" to satisfy the "gatekeeping" requirement of a successive motion under 28 U.S.C. § 2255(h). (Opp. 3) (quoting *Beeman v. United States*, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017)). But that proposition is far from obvious. In fact, it is dead wrong.

This Court has "held (over and over)" that the ACCA "does not care about" facts. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016). When applying any part of the ACCA's "violent felony" definition, a sentencing court "engag[es] in statutory interpretation, not judicial factfinding." *James v. United States*, 550 U.S. 192, 214 (2007). One benefit of the categorical approach is that it allows a sentencing (or immigration) court to perform the necessary analysis years later, without the difficulties of reconstructing what might-or-might-not have happened based on unreliable or incomplete records. Another benefit of the *legal* (rather than factual) approach is that it "avoids unfairness to defendants." *Mathis*, 136 S. Ct. at 2253. "[A] defendant may have no incentive to contest what does not matter under the law; to

the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 270 (2013)).

Because the ACCA requires only statutory interpretation, rather than factfinding, reviewing courts have the ability to correct erroneous ACCA sentences on direct appeal or, in appropriate cases, on collateral review. Properly understood, these courts' review should be *de novo*, like other matters of statutory interpretation. But for some reason, most of the lower courts have decided to treat post-conviction claims under *Johnson* differently. Rather than reviewing the abstract legality of the ACCA sentence without the residual clause, these courts insist that a criminal defendant must *prove* something about what the judge was (or might have been) *thinking about* when imposing the erroneous sentence.

This is a very strange approach. Reviewing courts do not normally require a defendant to prove any "historical facts" about a judge's *mens rea*. After all, we are not talking about judicial misconduct. Instead, courts resolve questions of statutory interpretation on their own abstract merit, without regard for what the lower court was thinking about or relying on.

Said another way, a post-conviction motion under *Johnson* does not contend that the sentencing judge was *actually thinking about* or "relying on" the ACCA's residual clause. Otherwise, the sentencing judge would become the primary fact witness, and probably could not preside over the post-conviction proceeding. Instead, these motions claim that the ACCA sentence was permissible only under the (unconstitutional) residual clause. These motions "contain[ ]" the new rule in *Johnson*

(as required by § 2255(h)(2)) because *Johnson* is the case that first revealed the unconstitutionality of the residual clause. For *that* claim to succeed, it does not matter whether the sentencing judge was "relying on" the residual clause, the elements clause, the enumerated offense clause, or gut instinct. It only matters whether a prior conviction covered by the residual clause remains a "violent felony" without that clause.

That is the only approach that makes sense. Absent some kind of invidious discrimination, the content of a sentencing judge's mind is no more relevant to the lawfulness of an ACCA-enhanced sentence than the contents of her lunch box. If, at the time of Mr. Dennis's ACCA-enhanced sentencing, the court had announced that it was "relying on" the *Magna Carta,* Mr. Dennis would not have a claim that his sentence was unlawful. The Texas aggravated assault convictions would have been covered by the residual clause, and he would "have no incentive to contest what does not matter under the law; to the contrary, he '[would] have good reason not to.'" *Mathis*, 136 S. Ct. at 2253.

For the ACCA, the only thing that matters is whether the elements of the prior offense satisfy the definition of "violent felony" or "serious drug offense." The facts do not matter. And if that is true of the brute facts about the prior conviction, then it is *surely* true about the facts surrounding the judge's thoughts at sentencing. Mr. Dennis's prior crimes were categorically violent under the ACCA's residual clause. As long as that clause remained in place, there was no incentive to fight about the ACCA.

The Fifth Circuit approach—adopted to varying degrees in many other circuits—seems to ignore everything this Court has ever said about the categorical approach. As hard as it would be for a defendant to *prove* the underlying facts about a prior conviction, that would still be easier than proving the contents of a silent judge's mind. This Court has "held (over and over)" that the ACCA "does not care about" facts. *Mathis*, 136 S. Ct. at 2257. That disposition should not change once the case shifts to collateral review.

B. If "historical facts" nonetheless matter, the Court should settle the dispute about a movant's burden of proof.

As the petition explained, the lower courts who embrace the "historical fact" approach to § 2255's are divided about a movant's burden of proof regarding reliance. (Pet. 24–25). That dispute is entrenched, acknowledged, and outcome determinative here. And in the circuits (like the Fifth Circuit) where this "gatekeeping" inquiry is deemed jurisdictional, it is even more important that courts apply the *correct* gatekeeping standard.

C. The Government cannot bring itself to defend the "jurisdictional" characterization of the Fifth Circuit's non-statutory gatekeeping jurisprudence.

The Fifth Circuit felt obligated to raise and apply its complex, non-statutory gatekeeping rules, even though the Government waived that argument and the district court did not address it:

> Although the Government does not address this issue in any detail in its briefing and the district court did not address it directly, we are required to address our jurisdiction sua sponte, if necessary.

Pet. App. 2a. The panel knew—because Mr. Dennis told it—that the Government no longer defended the "jurisdictional" characterization of the gatekeeping rules; in fact, it has conceded that the rules are, at most, waivable claims-processing requirements. Pet. App. 3a n.1. And as far as undersigned counsel is aware, the Fifth Circuit has never explained *why* it considers these requirements for authorized successive motions to be "jurisdictional" rules.

Yet the Fifth Circuit believed the matter was settled by its 2018 decision *In re Davila*, 888 F.3d 179 (5th Cir. 2018). In *Davila*, the court stated: "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." *Id.* at 183 (citing *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014)). The *Campbell* decision does not describe the "gates" as jurisdictional, and *Davila* itself betrays less rigor with the "jurisdictional" labor than this Court now requires. *See Davila*, 888 F.3d at 182 (describing procedural default as a "jurisdictional preprequisite[ ]"); *but see Trest v. Cain*, 522 U.S. 87, 89 (1997) (recognizing that procedural default "is not a jurisdictional matter").

Even so, the court described the rule as truly *jurisdictional* in *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), and the decision below demonstrates that the Fifth Circuit believes it must raise the matter on its own authority even after the Government waives it. (Pet. App. 2a–3a). The court does not care that the Solicitor General contends otherwise. (Pet. App. 3a n.1). The court does not care that the Sixth Circuit holds otherwise. *See Williams v. United States*, 927 F.3d 427, 439 (6th Cir.

2019) ("We therefore hold that § 2244(b)(4) does not impose a jurisdictional bar on a federal prisoner like Williams seeking relief under § 2255 either."). Until this Court intervenes, the Fifth Circuit will continue to hold a radically more constrained view of federal courts' jurisdiction than other circuits' hold.

D. If this Court is going to reverse in *Borden*, then it should at least remand this case so Mr. Dennis can have another go at the en banc Fifth Circuit on the gatekeeping question.

The Government makes no defense of the Fifth Circuit's "jurisdictional" classification of gatekeeping ruling because, in reality, there is no defense. No federal statute requires a prisoner to prove—as a "historical fact" and by a preponderance of the evidence—that his sentencing judge was actually relying on an unconstitutional statute when no other *valid* statute authorizes the sentence. And there is certainly no statute requiring such proof that Congress has been clearly delineated as jurisdictional. *Cf. Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

The lower courts' muddled misapplication of "gatekeeping" requirements is important enough to warrant immediate correction in this Court. Thus, Mr. Dennis asks the Court to grant certiorari on the second question presented and set the case for a decision on the merits. But, failing that, he asks at a minimum that the Court hold this petition if it is going to reverse in *Borden*.

A decision in favor of the petitioner in *Borden* will vindicate Mr. Dennis's claim that he is not an Armed Career Criminal without the unconstitutional residual clause. While none of the Fifth Circuit judges called for a poll on Mr. Dennis's petition for rehearing en banc (Pet. App. 8a–9a), some judges might reconsider that court's dubious gatekeeping jurisprudence after a decision from this Court plainly reveals

that Mr. Dennis's sentence is unlawful. Mr. Dennis should not have to suffer that unlawful sentence solely because his petition went to conference shortly before this Court decided *Borden*.

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 on the second question presented. Alternatively—if the Court agrees with the Solicitor General that the Fifth Circuit "did not reach" the recklessness argument (contra Pet. App. 5a n.4)—he asks that the Court grant certiorari now to resolve the second question presented. Finally, if the Court is going to hold in *Borden* that reckless aggravated assault offenses are not violent felonies, but the Court is not inclined to grant review on the gatekeeping question at this time, he asks that the Court remand the case for further consider in light of the Solicitor General's position on the non-jurisdictionality of the gatekeeping rules.

Respectfully submitted,

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