No. _____

In the

Supreme Court of the United States

DAVID RAY WALLACE,
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 Texas robbery—an offense that can be committed by recklessly causing injury or by placing the victim in fear of injury—has "the use of physical force against the person of another" as an element.

2.

Whether reasonable jurists could debate the district court's decision to dismiss Mr. Wallace's authorized successive motion to vacate.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

Petitioner has filed several post-conviction actions to challenge the judgment. Counsel's search revealed the following cases that appear to be directly related to this one:

United States v. David Ray Wallace, No. 3:02-CR-328 (N.D. Tex.)

United States v. David Ray Wallace, No. 03-10581 (5th Cir.)

David Ray Wallace v. United States, 04-5209 (U.S.)

United States v. David Ray Wallace, No. 3:05-CV-1453 (N.D. Tex.)

United States v. David Ray Wallace, No. 05-11451 (5th Cir.)

United States v. David Ray Wallace, 3:07-CV-177 (N.D. Tex.)

In re David Ray Wallace, No. 07-10288 (5th Cir.)

United States v. David Ray Wallace, No. 3:12-CV-3552 (N.D .Tex.)

United States v. David Ray Wallace, No. 12-10970 (5th Cir.)

United States v. David Ray Wallace, No. 14-11187 (5th Cir.)

In re David Ray Wallace, No. 16-10201 (5th Cir.)

United States v. David Ray Wallace, 3:16-CV-505 (N.D. Tex.)

United States v. David Ray Wallace, No. 19-10589 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Ray Wallace 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 order denying a Certificate of Appealability was not selected for publication. Pet. App. 1a–2a. A federal magistrate judge issued detailed findings, conclusions, and a recommendation for dismissal, 2019 WL 1243863, reprinted at 5a–27a, and the district court overruled Petitioner's objections, adopted the recommendation, and dismissed the case, 2019 WL 1243538. The district court's judgment is reprinted on page 292a of the Appendix.

JURISDICTION

This Court has jurisdiction to review denials of Certificate of Appealability under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 253 (1998). Judge Jones issued the order denying COA on July 31, 2020. On March 19, this Court extended the deadline to file certiorari to 150 days from the date of that order.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 28 U.S.C. § 2253(c), which provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255(h) provides:

(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.

This case also involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e):

(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—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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 [. . .]; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

The case involves the application of these provisions to the Texas offenses of aggravated robbery and burglary. Texas Penal Code § 29.02(a) defines "robbery" as follows:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> > (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
> >
> > (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Texas Penal Code § 29.03(a) defined "aggravated robbery" as follows:

> (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
>
> > (1) causes serious bodily injury to another;
> >
> > (2) uses or exhibits a deadly weapon[1]

Texas Penal Code § 30.02(a) defines "burglary" as follows:

> Sec. 30.02. BURGLARY. (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> > (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
> >
> > (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
> >
> > (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

[1] In 1989, Texas added a third aggravating fact, based on age or disability of the victim. Texas Penal Code § 29.03. This was after Mr. Wallace committed his simple robbery and his two aggravated robberies.

STATEMENT OF THE CASE

The single-judge order denying a Certificate of Appealability (Pet. App. 1a–2a) may not look like much, but beneath that placid surface lies a vibrant debate over several difficult, vexing legal issues that have flummoxed judges throughout the nation. The case is procedurally complex, but the current dispute is not. The only question resolved below was whether reasonable jurists could debate the district court's decision to dismiss Mr. Wallace's authorized motion to vacate under 28 U.S.C. § 2255(h). Pet. App. 1a–2a. As discussed in some detail in Section II of the Reasons for Granting the Petition, that question turns on several subsidiary debatable questions. Foremost among those is the first question presented by this petition.

Fortunately, this Court has already granted certiorari—twice—to resolve the first question, and it has heard argument. In *Walker v. United States*, 140 S. Ct. 519 (2019), this Court granted certiorari to decide whether Texas robbery, an offense defined at Texas Penal Code § 29.02, had the use of physical force as an element. Unfortunately, Mr. Walker passed away before the case could be decided, so the Court dismissed his petition for certiorari. *Walker v. United States*, 140 S. Ct. 953 (2020). The Court then granted certiorari in *Borden v. United States*, 140 S. Ct. 1262 (2020), to decide whether an offense that can be committed by recklessly causing serious bodily injury satisfies the ACCA's elements clause. *Borden* has been argued and submitted.

A. Factual Background

In 2003, a jury convicted Petitioner David Ray Wallace of possessing a firearm after felony conviction. Pet. App. 1a, 44a. 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 more than 24 years in prison. App., *infra*, 1a–2a.

After eighteen years of litigation, "the parties now agree" [2] on the four offenses that are said to support the ACCA enhancement:

> (1) "robbery, in violation of Texas Penal Code § 29.02(a)"; see PSR, ¶ 43; Dkt. No. 8 at 7-12;
>
> (2–3) "two aggravated robberies, in violation of Texas Penal Code § 29.03(a)(2),"; and
>
> (4) "burglary of a building, in violation of Texas Penal Code § 30.02(a)."

Pet. App. 7a.

At sentencing, Mr. Wallace's attorney objected that the burglary conviction should not count towards the ACCA because Mr. Wallace was only 16 years old he committed the crime, and there was no record of a waiver of juvenile-court jurisdiction, as one would expect to find if this were a true adult prosecution. The Probation Officer disagreed, 5th Cir. Sealed R. 1403, and the district court agreed with the Probation Officer. Pet. App. 36a. The court allowed Mr. Wallace to represent

[2] That was not always the case. "The presentence report" asserted "that Wallace had three convictions for aggravated robbery which served as predicate offenses for the sentence enhancement." *United States v. Wallace*, 92 F. App'x 985, 986 (5th Cir. 2004), Pet. App. 49a. The Government now agrees that one of those convictions (5th Cir. Sealed R. 1381, ¶ 43), was for *simple* robbery, not *aggravated* robbery, and the court documents support that concession. App. 6a–7a.

himself at the sentencing hearing, where he raised additional objections about the simple robbery conviction committed "when [he] was a juvenile." Pet. App. 32a–34a.

The district court was not persuaded. The court applied the ACCA and sentenced Mr. Wallace to 293 months in prison, followed by five years of supervised release. Pet. App. 1a, 38a, 45a–46a. The Fifth Circuit affirmed the conviction and sentence on direct appeal. *United States v. Wallace*, 92 F. App'x 985 (5th Cir. 2004), Pet. App. 48a–49a. This Court denied certiorari. *Wallace v. United States*, 543 U.S. 887 (2004) (04-5209). Because Petitioner also served time in state custody that was not counted towards his federal sentence, he remains in BOP custody under the original judgment.[3]

B. The Current Proceeding

After a variety of unsuccessful collateral attacks,[4] this Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015) gave Petitioner reason to hope things would finally be different. For many years, the Fifth Circuit had recognized that Texas robbery and aggravated robbery were "violent felonies under the Residual Clause." *United States v. Gore*, 636 F.3d 728, 744 (5th Cir. 2011) (Higginbotham, J., concurring). It stands to reason that those crimes would no longer "count" for the ACCA without the residual clause. The Fifth Circuit, at least initially, seemed to agree: "Wallace has made 'a sufficient showing of possible merit to warrant a fuller

[3] Based on its current calculations, BOP reports that Petitioner will remain in prison until 2031.

[4] E.g. 5th Cir. R. 572–573, 594–595, 648, 663–667, 695–696, 735–736.

exploration by the district court.'" Pet. App. 4a (quoting Reyes-Requena v. United States, 243 F.3d 893, 899 (5th Cir. 2001)). The court therefore granted him authorization to file a successive motion to vacate under 28 U.S.C. § 2255(h).

The Government mounted a vigorous defense of Mr. Wallace's sentence in the district court, but it did not argue that his motion was an improper successive motion to vacate or that the district court should refuse to address the merits under 28 U.S.C. § 2244(b)(4). The Government actually filed two detailed answers or responses—one in September 2016 (5th Cir. R. 96–110) and the other in May of 2018 (5th Cir. R. 243–246). *Neither* of those answers raised any kind of procedural defense. The Government's fight was all about the merits.

Unfortunately, the *merits* of Mr. Wallace's claim were clouded by a back-and-forth struggle in the Fifth Circuit over the right way to analyze Texas burglary and robbery offenses after *Johnson*. *Compare United States v. Fennell*, 2016 WL 4491728 (N.D. Tex. Aug. 25, 2016) (Texas robbery is not a violent felony after *Johnson*), *reconsideration denied*, 2016 WL 4702557, *aff'd*, 695 F. App'x 780 (5th Cir. 2017), and *United States v. Burris*, 896 F.3d 320 (5th Cir 2018) (Texas robbery *is not* a violent felony after *Johnson*), *with United States v. Burris*, 920 F.3d 942 (5th Cir. 2019) (Texas robbery *is* a violent felony after *Johnson*); *compare also United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc) (Texas burglary is indivisible and *is not* a violent felony after *Johnson*), *with United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc) (Texas burglary is indivisible but *is* a violent felony after *Johnson*),

Mr. Wallace will concede that, as of the date this petition is filed, Fifth Circuit precedent (in *Herrold* and *Burris*) forecloses his claim on the merits. But the grants of certiorari in in *Walker* and *Borden* demonstrate that the merits are datable among reasonable jurists. And if Borden prevails, then Mr. Wallace should probably prevail as well. There are other issues to fight about—those are discussed in Section II below—but they are all demonstrably debatable, and Mr. Wallace's argument should carry the day.

The district court's decision was, admittedly, more complex than this. The court took it upon itself to consider all manner of knotty procedural issues that have divided the circuits. (ROA.259–273). The court decided that it might not be enough for Mr. Wallace to show on the merits that his ACCA sentence was lawful under the defunct residual clause but violated the Constitution and exceeded the lawful statutory maximum without that clause. Mr. Wallace would need to prove, as a historical matter, perhaps by a preponderance of the evidence, that the sentencing court actually "relied on" the ACCA's residual clause, or that it was "more likely than not" the case that the sentencing court relied on the residual clause (ROA.271), or maybe that the sentencing court "may have" relied on the residual clause to apply the ACCA. (ROA.271). This is all a mess. But it can be sorted out below.

Despite multiple raging debates among the lower courts on the merits and procedure of cases like Mr. Wallace's, the district court and the Fifth Circuit both denied a COA. Pet. App. 1a–2a. This timely petition follows.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD HOLD THIS PETITION PENDING RESOLUTION OF *BORDEN* AND *BURRIS*.

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 Tennessee aggravated assault statute in that case is remarkably similar to the Texas aggravated robbery statute at issue here. The Court should hold this petition pending a decision in *Borden*, and any follow-on decision in *Burris*. If the petitioners in those cases prevail, the Court should vacate the Fifth Circuit's denial of COA and remand.

A. Texas's robbery and aggravated robbery statutes are defined in terms of injury, not application of force. Both can be committed recklessly.

Texas defines "robbery" in an unusual way. "The majority of states require property to be taken from a person or a person's presence by means of force or putting in fear." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), The same is true of most federal robbery statutes.

But Texas is different: both robbery and aggravated robbery define the *actus reus* in terms of *result*. A thief becomes a robbery if, during the course of theft, attempted theft, or flight, he "knowingly, intentionally, or recklessly causes bodily injury" to someone else or if he "intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Texas Penal Code § 29.02(a). Aggravated robbery, when Mr. Wallace committed the crime, required proof that he either caused serious bodily injury or used something capable of causing serious bodily injury. Texas Penal Code § 29.03(a).

Texas court decisions confirm that prosecutors utilize the statute too its full, unusual extent. For example, Texas's highest criminal court upheld a conviction for aggravated robbery where the defendant and the victim never even interacted. In *Howard v. State*, 333 S.W.3d 137, 138 (Tex. Crim. App. 2011), a store clerk observed an armed defendant on a video screen from a locked room, and felt fear. That was aggravated robbery. *Id.* In *Martin v. State*, 03-16-00198-CR, 2017 WL 5985059, at *6 (Tex. App.—Austin Dec. 1, 2017, no pet.), a shoplifter told two Hobby Lobby employees that "she had AIDS," which made the one of the "victims" feel "'worried' and 'scared' of 'contracting AIDS [and] dying.'" *Id.*, 2017 WL 5985059, at *1 (Tex. App.—Austin Dec. 1, 2017, no pet.). That was robbery.

The most recent ruling from the Fifth Circuit held that all forms of Texas robbery (and by extension, all forms of Texas aggravated robbery) satisfy the ACCA's elements clause, notwithstanding the unusually broad scope of the law and prior Fifth Circuit decisions saying otherwise. *See Burris*, 920 F.3d at 953–958. The petition for certiorari in *Burris* (Case 19-6186) has been pending since October 2019. It would appear that the Court is holding *Burris* to await the outcome in *Borden*.

B. A decision in favor of *Borden* or *Burris* should upend the COA denial.

Mr. Wallace is entitled to a COA if he can make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). He meets his burden if he shows "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could

conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

A Court of Appeals is not supposed to decide the merits of a claim, and then resolve debatability based on that merits determination. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The COA standard does not ask whether a matter is debatable *within the Fifth Circuit*. The question is whether reasonable jurists could debate the outcome *in the abstract*.

If the petitioners in *Borden* and *Burris* prevail in this Court, then that will show that the merits of Mr. Wallace's motion are debatable. And the procedural points are plainly debatable, given the ongoing debate among the lower courts. Therefore, this Court should hold this petition and then remand for further consideration in light of *Borden*, *Burris*, or both.

II. IF TEXAS ROBBERY IS NOT CATEGORICALLY VIOLENT, THEN THE PROCEDURAL AND SUBSTANTIVE MERITS OF MR. WALLACE'S MOTION ARE DEBATABLE.

The Fifth Circuit's denial of COA was short on analysis, but the underlying district court decision goes into great depth about the various issues presented by Mr. Wallace's motion. (Pet. App. 5a–27a). These matters are extremely complex and probably aren't briefed well enough below to set them up for resolution here. Thus, Mr. Wallace will provide only a brief discussion here to head-off any attempt by Respondent to argue that resolution of the first question might not change the outcome below.

A. If Texas robbery falls, then Texas aggravated robbery should fall as well.

If Texas robbery is not categorically violent, then that will deprive the Government of Mr. Wallace's simple robbery conviction. But he still has two convictions for aggravated robbery and one for burglary. Even so, there is reason to believe (and certainly room to argue) that a win for the petitioners in *Borden* and *Burris* will knock out the two aggravated robbery convictions, too.

1. To prove aggravated robbery under Texas Penal Code § 29.03(a), prosecutors must first prove the elements of *simple* robbery under § 29.02. The Fifth Circuit's decision in *Burris* foreclosed Mr. Wallace's arguments on the merits as to all three convictions. If *Burris* is vacated, then this case should be as well.

2. Like the Tennessee aggravated assault offense at issue in *Borden*, Texas aggravated robbery can be committed by recklessly driving a car. *See*, e.g., *State v. Montelongo*, No. CR-1706-08-H (389th Dist. Ct., Hidalgo County, Tex., July 7, 2008).

3. One panel of the Fifth Circuit has ruled that Texas aggravated robbery is divisible, and that a robbery committed by threat or fear with a deadly weapon independently satisfies the ACCA's elements clause, even if a simple robbery would not. *See United States v. Lerma*, 877 F.3d 628, 636 (5th Cir. 2017). But *Burris* eliminated any need for the Court of Appeals to rule on the continuing viability of *Lerma*—because *Burris* held that all forms of Texas robbery are violent, then divisibility doesn't matter. In fact, Texas cases confirm that jurors need not be unanimous about which theory of robbery (fear or injury) and which aggravator (serious injury, deadly weapon, or, post-1989, elderly victim) the prosecution has

proven. *See Woodard v. State*, 294 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) ("[U]nanimity was not required for the aggravating factors" of aggravated robbery. *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App.—Fort Worth 2017, no pet.) ("[C]ausing bodily injury or threatening the victim are different methods of committing the same offense" "of aggravated robbery," that can be submitted in the disjunctive without violating the requirement of juror unanimity.).

4. Another panel of the Fifth Circuit acknowledged that it is "unclear" whether *Lerma*'s divisibility analysis would survive a close review of Texas cases. *See United States v. Wheeler*, 799 F. App'x 221, 223 (5th Cir. 2018), *opinion vacated and superseded on reh'g*, 754 Fed. Appx. 282 (5th Cir. 2019). But after *Burris*, divisibility did not matter and the court decided the case on that basis. If *Burris* goes, then *Lerma* will be debatable and will likely fall to a careful analysis of Texas unanimity precedent like *Burton* and *Woodard*.

B. It is at least debatable whether Texas burglary is categorically violent.

The Seventh Circuit has held that a burglary crime worded identically to Texas Penal Code § 30.02(a)(3) is non-generic and not a violent felony. *See Van Cannon v. United States*, 890 F.3d 656, 664 (7th Cir. 2018). *Herrold* construed the Texas statute in a way that would exclude the non-generic theory, and this Court later denied certiorari. But the matter remains debatable, at least for purposes of the low threshold for a COA. There are many Texas cases that suggest *Herrold* got the analysis of § 30.02(a)(3) wrong. The Fifth Circuit has thus far refused to reconsider

its construction of Texas law, but it may do so if Mr. Wallace's simple robbery conviction is unavailable for the Government.

C. The procedural complexities are also debatable.

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.

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 district court decision, 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."); *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018), *as revised* (Aug. 14, 2018) (ascribing "jurisdictional" significance to the district court's gatekeeping analysis); *Clay*, 921 F.3d 550, 554 (5th Cir. 2019) ("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. *Williams v. United States*, 927 F.3d 427, 434 (6th Cir. 2019). If that is correct (and it is), the district court had no business invoking the successive-motion procedural standards *sua sponte*.

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.

3. It is debatable whether the gatekeeping inquiry applies to § 2255 motions at all, and if so, whether that requires any proof of historical "reliance."

The text of 28 U.S.C. § 2255(h) does not explicitly incorporate the district-court gatekeeping procedure required by § 2244(b)(4). Section 2244, by its own terms, applies only to state-court defendants challenging their incarceration via a writ of habeas corpus. Federal prisoners have broader remedies available under 28 U.S.C. § 2255. The only part of § 2244 explicitly adopted by § 2255(h) is the Court of Appeals's certification.

But even assuming that the district court is supposed to perform a function for § 2255 motions similar to § 2244(b)(4), it is hard to see why anyone would care about the content of the sentencing court's mental state when reviewing a decades-old sentence like this. The text of § 2255(a) asks whether the sentence exceeds the lawful statutory maximum, or violates the constitution. Mr. Wallace's does. Because this is a successive motion, he needed certification that his proposed motion "contain[ed]" the new constitutional rule in *Johnson*. § 2255(h). The motion did "contain" that new rule, and the Court of Appeals granted that certification. Pet. App. 2a–3a. And to

whatever extent he also had to show *that his motion* "relied on" the new rule in *Johnson*, he did, and it does. It is undisputed that Mr. Wallace was properly characterized as an Armed Career Criminal *under the residual clause*. *Gore*, 636 F.3d at 744 (Higginbotham, J.) (Texas robbery and aggravated robbery were residual-clause violent felonies.); *United States v. Ramirez*, 507 F. App'x 353 (5th Cir. 2013) (affirming a decision that Texas Penal Code § 30.02(a)(3) was not generic burglary but was nonetheless a residual-clause violent felony).

CONCLUSION

Mr. Dennis asks that this Court hold the petition pending a decisions in *Borden* and *Burris*, then grant the petition and remand for further consideration in light of those decisions.

Respectfully submitted,

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