In the

# Supreme Court of the United States

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DAVID RAY WALLACE,
*PETITIONER*,

v.

UNITED STATES OF AMERICA,
*RESPONDENT*,

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

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PETITION APPENDIX

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 19-10589



UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID RAY WALLACE,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

David Ray Wallace, federal prisoner # 29587-177, was convicted by a jury of unlawfully possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). He was sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to 293 months of imprisonment. This court granted Wallace tentative authorization to file a successive 28 U.S.C. § 2255 motion raising claims grounded in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which determined that the residual clause of the ACCA was unconstitutionally vague. The district court dismissed his authorized successive § 2255 motion on jurisdictional grounds, finding that Wallace failed to show his claims relied on a new rule of constitutional law as announced by the Supreme Court and made retroactively applicable to his case on collateral

review. Wallace now moves this court for a certificate of appealability (COA) to appeal the district court's dismissal of his successive § 2255 motion.

Wallace argues that reasonable jurists could debate the district court's conclusion that he failed to show that *Johnson* was retroactively applicable to his case on collateral review. He contends that it is debatable whether his prior Texas convictions for burglary and aggravated robbery qualify as violent felonies under the ACCA after *Johnson*.

To obtain a COA, Wallace must 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). A COA movant makes that showing "by demonstrating 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).

Wallace has not made the required showing to obtain a COA. *See id.* His motion for a COA is therefore DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 16-10201

In re: DAVID RAY WALLACE,

Movant

A True Copy
Certified order issued Jun 06, 2016

Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Dallas to consider
a successive 28 U.S.C. § 2255 motion

Before DAVIS, JONES, and HAYNES, Circuit Judges.

PER CURIAM:

David Ray Wallace, federal prisoner # 29587-177, filed a pro se motion for authorization to file a successive 28 U.S.C. § 2255 motion. Thereafter, this court granted Wallace's motion for appointment of counsel. Now, appointed counsel moves on Wallace's behalf to withdraw Wallace's pro se motion for authorization to file a successive § 2255 motion and to substitute a new motion for authorization to file a successive § 2255 motion. *See* § 2255(h); 28 U.S.C. § 2244(b)(3)(C); *Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001) (incorporating § 2244(b)(3)(C) into § 2255). We GRANT counsel's motion to withdraw and substitute.

Wallace's proposed § 2255 motion challenges the enhancement of his sentence for possession of a firearm by a felon under the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e)(2)(B)(ii); *United States v. Wallace*, 92 F. App'x 985 (5th Cir. 2007) (noting that Wallace's three prior convictions

qualified as predicate offenses under § 924(e)). Wallace contends that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the ACCA as unconstitutionally vague, established a new rule of constitutional law made retroactive to cases on collateral review. *See* § 2255(h)(2).

Wallace has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Reyes-Requena*, 243 F.3d at 899 (internal quotation marks and citation omitted); *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Accordingly, his motion for authorization to file a successive § 2255 motion is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Wallace has failed to make the showing required to file such an application. *See* § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899. We express no opinion as to what decisions the district court should make. Wallace's motion for oral argument is DENIED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| DAVID RAY WALLACE, | § | |
| | § | |
| Movant, | § | |
| | § | |
| V. | § | No. 3:16-cv-1529-G-BN |
| | § | |
| UNITED STATES OF AMERICA, | § | |
| | § | |
| Respondent. | § | |

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

After receiving authorization from the United States Court of Appeals for the Fifth Circuit, *see* Dkt. No. 1, Movant David Ray Wallace, a federal prisoner, filed, through counsel, a successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 requesting relief under *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), *see* Dkt. No. 2.

This resulting action has been referred to the undersigned United States magistrate judge for pretrial management under 28 U.S.C. § 636(b) and a standing order of reference from Senior United States District Judge A. Joe Fish.

The government filed a response opposing relief. *See* Dkt. No. 8. Wallace filed, with leave of Court, an out-of-time reply brief. *See* Dkt. Nos. 9, 10, 11, & 12. And, on September 20, 2017, the Court stayed and administratively closed this action pending a decision from the en banc Fifth Circuit on whether Texas burglary is a violent felony under the Armed Career Criminal Act ("ACCA"), *see* Dkt. No. 14.

Wallace now moves to reopen his case. *See* Dkt. No. 15. The government filed a

response to that motion, *see* Dkt. No. 17, and Wallace filed a reply brief, *see* Dkt. No. 18.

The undersigned enters these findings of fact, conclusions of law, and recommendation that the Court should grant the motion to reopen this action and then dismiss the successive Section 2255 motion under 28 U.S.C. § 2244(b)(4).

**Applicable Background**

Wallace "was convicted of unlawful possession of a firearm in violation of 18 U.S.C. §§ 922(g) & 924(e)," and, in May 2003, he "was classified as an armed career criminal and sentenced to 293 months in prison and five years of supervised release." *United States v. Wallace*, 628 F. App'x 310, 310 (5th Cir. 2016) (per curiam) (citing *United States v. Wallace*, 92 F. App'x 985 (5th Cir. 2004) (per curiam) (affirming Wallace's conviction and "his sentence pursuant to 18 U.S.C. § 924(e). This court reviews the issue *de novo*.... The presentence report reveals that Wallace had three convictions for aggravated robbery which served as predicate offenses for the sentence enhancement. *See United States v. Munoz*, 150 F.3d 401, 419 (5th Cir. 1998). The district court did not err.")); *see also generally United States v. Wallace*, No. 3:02-cr-328-G (01) (N.D. Tex.).

Notwithstanding the Fifth Circuit direct-appeal decision's reference to three aggravated robbery convictions, both the government and Wallace now contend that he was determined to be an armed career criminal, *see Wallace*, No. 3:02-cr-328-G (01) (N.D. Tex.), Dkt. No. 106 ("PSR"), ¶ 25, based on four prior Texas convictions: (1) robbery, in violation of Texas Penal Code § 29.02(a), *see* PSR, ¶ 43; Dkt. No. 8 at 7-12;

Dkt. No. 8-1 at 2-14; Dkt. No. 12 at 1-11; (2) two aggravated robberies, in violation of Texas Penal Code § 29.03(a)(2), *see* PSR, ¶¶ 50 & 51; Dkt. No. 8 at 13-15; Dkt. No. 8-1 at 15-24, 51-67; Dkt. No. 12 at 11-12; and (3) burglary of a building, in violation of Texas Penal Code § 30.02(a), *see* PSR, ¶ 42; Dkt. No. 8 at 12-13; Dkt. No. 8-1 at 25-50; Dkt. No. 12 at 13-15. These four convictions were those highlighted in Wallace's motion for authorization to file a successive Section 2255 motion. *See In re Wallace*, No. 16-10201 (5th Cir.), Dkt. No. 32 at 5.

Prior to this Section 2255 action, Wallace filed "a number of post-conviction motions, including a 28 U.S.C. § 2255 motion, which the district court denied on the merits." *Wallace*, 628 F. App'x at 310; *see id.* at 310-11 (affirming this Court's conclusion that Wallace's Rule 60(b) motion was also an unauthorized successive Section 2255 motion, denying IFP, and dismissing the appeal as frivolous); *see also, e.g., United States v. Wallace*, No. 3:02-cr-328-G, 2014 WL 4426259 (N.D. Tex. Aug. 19, 2014), *rec. adopted*, 2014 WL 4435827 (N.D. Tex. Sept. 9, 2014).

**Legal Standards**

I. *Samuel Johnson*'s Impact.

As the United States Supreme Court recounted in *Samuel Johnson*,

> Federal law forbids certain people – such as convicted felons, persons committed to mental institutions, and drug users – to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the [ACCA] increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *[Curtis] Johnson v. United States*, 559 U.S. 133, 136 (2010). The Act defines "violent felony" as follows:
>
> "any crime punishable by imprisonment for a term

> exceeding one year ... 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*." § 924(e)(2)(B) (emphasis added).
>
> The closing words of this definition, italicized above, have come to be known as the Act's residual clause.

135 S. Ct. at 2555-56.

In *Samuel Johnson*, the Supreme Court held "that imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." *Id.* at 2563. That decision thus "affected the reach of the [ACCA] rather than the judicial procedures by which the statute is applied" and therefore is "a substantive decision and so has retroactive effect under *Teague[ v. Lane*, 489 U.S. 288 (1989),] in cases on collateral review," *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). But that "decision [did] not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." *Samuel Johnson*, 135 S. Ct. at 2563.

Therefore, after *Samuel Johnson*, "[a] violent felony is one of a number of enumerated offenses or a felony that 'has an element the use, attempted use, or threatened use of physical force against the person of another.'" *United States v. Moore*, 711 F. App'x 757, 759 (5th Cir. 2017) (per curiam) (quoting 18 U.S.C. § 924(e)(2)(B)); *see, e.g., United States v. Lerma*, 877 F.3d 628, 630 (5th Cir. 2017) ("The government concedes that Lerma's sentence could not have constitutionally rested upon the residual clause in light of *[Samuel] Johnson* and *Welch*" and that "Lerma's prior

convictions were not for any of the four enumerated offenses listed in § 924(e)(2)(B)(ii). The only question then is whether Lerma's sentence can be sustained pursuant to the ACCA's force clause. That is, does the crime under the Texas aggravated robbery statute for which Lerma was previously convicted at least three times 'ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another'?" (quoting Section 924(e)(2)(B)(i))).

II. A Collateral Attack Under *Samuel Johnson*.

Relief under Section 2255 is limited to a claim "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." 28 U.S.C. § 2255(a); *cf. Zalawadia v. Ashcroft*, 371 F.3d 292, 299 (5th Cir. 2004) ("[U]nlike direct review where the correctness of a court or agency order is comprehensively and directly before the court, a habeas court reviews the correctness of such an order only insofar as it relates to 'detention simpliciter.' In other words, habeas is not shorthand for direct review." (citations omitted)).

A *Samuel Johnson* claim under Section 2255, then, is necessarily that a movant's constitutional right to due process was violated – or that he was sentenced in excess of the maximum authorized by law (for example, that he received a minimum sentence of 15 years under Section 924(e), as opposed to a maximum sentence of 10 years under Section 924(a)(2)) – because he was sentenced under the ACCA's residual clause.

The Fifth Circuit, "join[ing] the majority of [its] sister circuits," has held that a court "must look to the law at the time of sentencing to determine whether a sentence was imposed" in violation of *Samuel Johnson* – that is, it was imposed under the ACCA's residual clause, as opposed to its enumerated offense clause or its force clause. *United States v. Wiese*, 896 F.3d 720, 724 (5th Cir. 2018) (collecting cases).

And, generally speaking, a movant "has a burden of sustaining" a contention that he was sentenced in violation of *Samuel Johnson* – or any other contention in a Section 2255 motion – "by a preponderance of the evidence." *United States v. Bondurant*, 689 F.2d 1246, 1251 (5th Cir. 1982) (citing *Wright v. United States*, 624 F.2d 557, 558 (5th Cir. 1980)); *see also Coon v. United States*, 441 F.2d 279, 280 (5th Cir. 1971) ("A movant in a collateral attack upon a judgment has the burden to allege and prove facts which would entitle him to relief."); *United States v. Ellis*, Crim. No. 13-286, 2018 WL 1005886, at *2 (E.D. La. Feb. 21, 2018) ("Ultimately, the petitioner bears the burden of establishing his claims of error by a preponderance of the evidence." (citing *Wright*, 624 F.2d at 558)).

The preponderance of the evidence standard – which, for example, also applies to the government's burden to prove sentencing enhancements, *see, e.g., United States v. Myers*, 772 F.3d 213, 220 (5th Cir. 2014) (citations omitted) – requires "evidence by fifty-one percent, or to the extent of more likely than not," *United States v. Diaz*, 344 F. App'x 36, 43 (5th Cir. 2009) (per curiam) (citation, brackets, and internal quotation marks omitted); *see also Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co.*, 173 F. Supp. 3d 363, 384 n.9 (N.D. Tex. 2016) ("Proving a fact by a 'preponderance of the

evidence' means showing that the existence of a fact is more likely than not. Thus, to prove a fact or claim by a preponderance of the evidence, a party must prove that it is more likely than not that its version of the facts is true." (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983))).

So it would seem that, to establish a Section 2255 claim based on *Samuel Johnson*, a movant must show that it is more likely than not that the violent felony at issue qualified as a predicate conviction toward his ACCA sentencing enhancement under the now-invalidated residual clause. *See Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017) ("Only if the movant would not have been sentenced as an armed career criminal absent the existence of the residual clause is there a *[Samuel] Johnson* violation. That will be the case only (1) if the sentencing court relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause (neither of which were called into question by *[Samuel] Johnson*) to qualify a prior conviction as a violent felony, and (2) if there were not at least three other prior convictions that could have qualified under either of those two clauses as a violent felony, or as a serious drug offense."); *see also United States v. Winterroth*, ___ F. App'x ____, No. 17-40554, 2019 WL 151332, at *2 (5th Cir. Jan. 9, 2019) (per curiam) (as applied to a successive motion, *Samuel Johnson* "struck down the residual clause of the ACCA's ... 'violent felony' definition as unconstitutionally vague. Thus, for *[Samuel] Johnson* to be relevant, Winterroth must show that the sentencing judge relied on the residual clause to sentence Winterroth. 'Merely a theoretical possibility' that the district court relied on the residual clause is

insufficient." (citations omitted)).

But application of this seemingly straightforward proposition is complicated by the pre-*Samuel Johnson* sentencing landscape, in which district courts generally did not specify – and, indeed, had no duty to (and generally no reason to) specify – which clause of the ACCA applied to which predicate violent felony. *Cf. Massey v. United States*, 895 F.3d 248, 253 & n.10 (2d Cir. 2018) (after "hold[ing] that where it is clear from the record that a movant's sentence was enhanced pursuant to the ACCA's force clause, [his] § 2255 claim does not rely on *[Samuel Johnson]* for the purposes of 28 U.S.C. § 2255(h)," observing that this holding is "consistent with" the "diligent analyses" provided by other circuits' decisions that "addressed whether a § 2255 movant's claim relies on *[Samuel Johnson]* when it was unclear from the sentencing record whether the movant was sentenced under the residual clause, the force clause, or the enumerated offense clause").

And, in the context of determining whether successive Section 2255 motions invoking *Samuel Johnson* were thereby based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," 28 U.S.C. § 2255(h)(2),the Fifth Circuit has surveyed the various approaches that other circuits have utilized to determine whether it was shown that a movant's claim truly was based on *Samuel Johnson*. *See generally United States v. Taylor*, 873 F.3d 476 (5th Cir. 2017); *Wiese*, 896 F.3d 720.

In *Taylor*, the Fifth Circuit first pointed to the Fourth Circuit's resolution of the common problem of a sentencing record that does "not establish that the residual

clause served as the basis for concluding that defendant's prior convictions ... qualified as violent felonies." *Taylor*, 873 F.3d at 480 (quoting *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); brackets omitted). There, the Fourth Circuit

> declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.* The court explained that "nothing in the law requires a court to specify which clause it relied upon in imposing a sentence." *Id.* (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit worried that "imposing the burden on movants urged by the government ... would result in 'selective application' of the new rule of constitutional law announced in [*Samuel Johnson*]." *Id.* That result would violate "'the principle of treating similarly situated defendants the same.'" *Id.* (quoting *Teague*, 489 U.S. at 304).

*Id.* (citation modified).

The Ninth Circuit has taken a similarly more lenient approach, *see id.* at 480 (discussing *United States v. Geozos*, 870 F.3d 890, 895-96 (9th Cir. 2017), under which, "when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant's § 2255 claim 'relies on' the constitutional rule announced in *[Samuel] Johnson*," *id.* (quoting *Geozos*, 870 F.3d at 896).

But the Tenth and Eleventh Circuits "have required movants to show something more." *Id.*

> The Tenth Circuit determined it is possible to tell whether a district court relied upon the residual clause when the sentencing record is unclear "by looking to the relevant background legal environment at the time of sentencing." *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017) (quoting *Geozos*, 870 F.3d at 896). Courts take a "snapshot" of the law at the time of the sentencing and determine whether a defendant's convictions "fell within the scope" of the other ACCA clauses. *Id.* If there "would have been no need for reliance on the residual clause," then the

> defendant fails to meet his burden.

*Id.* at 480-81 (citation modified). And, more recently,

> a panel of the Eleventh Circuit ruled, over dissent, that "[t]o prove a *[Samuel] Johnson* claim, the movant must show that – more likely than not – it was use of the residual clause that led to the sentencing court's enhancement of his sentence." *Beeman*, 871 F.3d at 1221-22. But the court acknowledged in a footnote that "if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." *Id.* at 1224 n.5. The court stressed that it is the state of the law at the time of the sentencing that matters, and subsequent legal decisions would "cast[ ] very little light, if any," on the question of whether the defendant was sentenced under the residual clause. *Id.*

*Id.* at 481 (citations modified); *cf. United States v. Castro*, ___ F. App'x ____, No. 17-40312, 2018 WL 6070373, at *2 (5th Cir. Nov. 20, 2018) (per curiam) (citing the Oxford English Dictionary to note that "[a] residual clause is just that – something that is 'left over' and considered after the primary question has first been reviewed" (citation omitted)).

Thus, as the Fifth Circuit later held in *Wiese* (again, in the context of a successive motion), while "[t]he dispositive question for jurisdictional purposes [ ] is whether the sentencing court relied on the residual clause in making its sentencing determination – if it did, then *[Samuel] Johnson* creates a jurisdictional predicate for the district court" – and while a court on Section 2255 review "must look to the law at the time of sentencing to determine whether a sentence was imposed under the enumerated offenses [or the elements] clause[s versus] the residual clause," "the circuits are not in accord on how we decide whether the original sentencing court relied

on the residual clause, and we previously have not established a standard to determine whether the sentencing court relied on the residual clause for *[Samuel] Johnson* purposes." *Wiese*, 896 F.3d at 724 (citations omitted).

As of the time of the Fifth Circuit's decision in *Wiese*, the Fourth and Ninth Circuits stood together in applying what may be distilled to a "may have" standard. *See id.* (citing *Winston* and *Geozos*); *see also United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018) ("In our view, § 2255(h) only requires a petitioner to show that his sentence may be unconstitutional in light of a new rule of constitutional law made retroactive by the Supreme Court," a standard that may be met "by demonstrating that he may have been sentenced under the residual clause of the ACCA, which was rendered unconstitutional by *[Samuel] Johnson*."). But the First and Sixth Circuits had joined the Tenth and Eleventh Circuits in applying a more exacting standard, which the Eleventh Circuit has classified as a "more likely than not" standard. *See Wiese*, 896 F.3d at 724 (citing *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018); *Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018); and *Beeman*); *see also Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018) ("We agree with those circuits that require a movant to show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement. Under the longstanding law of this circuit, a movant bears the burden of showing that he is entitled to relief under § 2255. The mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive motion." (citations

omitted)).

The Fifth Circuit has so far refused to commit to any standard. *But see Wiese*, 896 F.3d at 724 (noting "that the 'more likely than not' standard appears to be the more appropriate standard since it comports with the general civil standard for review and with the stringent and limited approach of AEDPA to successive habeas applications").

The Court of Appeals instead held that "Taylor's § 2255 claim merits relief under all of them." *Taylor*, 873 F.3d at 481. Under the "may have" standard, a post-*Samuel Johnson* Fifth Circuit decision held that the un-enumerated, state violent felony "necessary to sustain Taylor's sentence enhancement" is broader than the ACCA's elements clause. *Id.* at 482. "Thus, Taylor's claim would merit relief in both the Fourth and Ninth Circuits." *Id.* As to the more exacting approaches,

> [a]t the time of Taylor's sentencing, [the Fifth Circuit] had not ruled directly on the question of whether Texas's injury-to-a-child offense is broader than the ACCA's elements clause. But here, unlike the cases from the Tenth and Eleventh Circuits, there was precedent suggesting that Taylor's third predicate conviction could have applied only under the residual clause. *See United States v. Gracia-Cantu*, 302 F.3d 308, 311-13 (5th Cir. 2002). Thus, even using the Tenth Circuit's "snapshot" inquiry or the Eleventh Circuit's "more likely than not" test, Taylor would prevail. Theoretically, the district court mistakenly could have been thinking of the elements clause when sentencing Taylor. But this court will not hold a defendant responsible for what may or may not have crossed a judge's mind during sentencing.

*Id.* at 482.

On the other hand, the Fifth Circuit ruled that Wiese failed to show that his claim – which turned on Texas burglary, *see* TEX. PENAL CODE § 30.02(a), as the crime

necessary to sustain his ACCA enhancement, burglary being an enumerated offense in that statute – was based on *Samuel Johnson* (the "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)(2)) under the more lenient "may have" standard, *Wiese*, 896 F.3d at 724-25. In so doing, the Court of Appeals noted that, "[i]n determining potential reliance on the residual clause by the sentencing court," a reviewing court "may look to (1) the sentencing record for direct evidence of a sentence, and (2) the relevant background legal environment that existed at the time of the defendant's sentencing and the presentence report ("PSR") and other relevant materials before the district court." *Id.* at 725 (citations, internal quotation marks, and brackets omitted).

As to Wiese,

> although the sentencing judge did not make any statement as to which clause was used for the sentencing enhancement, it is not "more likely than not" that the residual clause came into play. As well, there is nothing to indicate that the sentencing judge "may have" relied on the residual clause.
>
> In 2003, when Wiese was convicted of being a felon in possession, all of § 30.02(a) was considered generic burglary under the enumerated offenses clause of ACCA. *See United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992); *see also United States v. Stone*, 72 F. App'x 149, 150 (5th Cir. 2003) (per curiam) (citing *Silva*, 957 F.2d at 161-62). That we held five years later that § 30.02(a)(3) is not generic burglary, *United States v. Constante*, 544 F.3d 584, 587 (5th Cir. 2008) (per curiam), or that we held earlier this year that § 30.02(a) is indivisible, *[United States v. Herrold*, 883 F.3d 517, 529 (5th Cir. 2018) (en banc)], is of no consequence to determining the mindset of a sentencing judge in 2003. Indeed, *Herrold*'s state law analysis that undergirded the divisibility determination was largely based upon a Texas Court of Appeals case decided five years after the sentencing in this case. *See Herrold*, 883 F.3d at 523, 525 (citing *Martinez v. State*, 269 S.W.3d 777 (Tex. App. – Austin

> 2008, no pet.)). Thus, at the time of sentencing, there was absolutely nothing to put the residual clause on the sentencing court's radar in this case.
>
> What is more, the PSR and other documents before the sentencing court clearly indicate that the sentencing judge would have relied on the enumerated offenses clause in sentencing Wiese.

*Id.* at 725 (footnote omitted); *see also Castro*, 2018 WL 6070373, at *2 (refusing to distinguish *Wiese* based on its reliance on conviction documents before the sentencing court "showing he was convicted under subsection (a)(1) of the Texas burglary offense" and explaining that "we do not see why that requires a different result given that in 2000 any conviction for Texas burglary of a habitation qualified as generic burglary. There was no need to resort to the modified categorical approach, which is the point of considering state conviction records, to reach that conclusion." (citation omitted)).

That the Fifth Circuit first addressed these standards in the context of determining whether there is jurisdiction over successive Section 2255 motions raising *Samuel Johnson* claims makes some sense, because "[a] second or successive habeas application must meet strict procedural requirements before a district court can properly reach the merits of the application." *Wiese*, 896 F.3d at 723 (citing 28 U.S.C. §§ 2244(b) & 2255(h); *Reyes-Requena v. United States*, 243 F.3d 893, 896-900 (5th Cir. 2001)). And that Section 2255(h)(2)'s requires "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" squarely focuses a court on *Samuel Johnson*'s applicability.

But, in *United States v. Craven*, ___ F. App'x ____, No. 17-60210 (5th Cir. Nov. 29, 2018) (per curiam), a panel of the Fifth Circuit applied these standards to

determine whether an initial Section 2255 motion was timely under 28 U.S.C. § 2255(f)(3) "because it was filed within a year of the Supreme Court deciding *[Samuel] Johnson*." *Id.* at 2. And, according to the *Craven* panel, "[t]he threshold question to determine the timeliness of Craven's motion is whether he asserted a *[Samuel] Johnson* claim, i.e., whether he claimed that he was sentenced under the ACCA's residual clause." *Id.*; *see also id.* at 3 (concluding that, because "[t]he PSR based its violent felony determinations for the possession of a short-barreled shotgun and car theft convictions on Eighth Circuit cases finding those crimes to be violent felonies under the ACCA's residual clause and an analogous sentencing guidelines provision," "it is more likely than not that the district court relied on the residual clause for at least two of the four convictions used to enhance Craven's sentence. At least one of these convictions was necessary to sustain the enhancement. Craven asserted a *[Samuel] Johnson* claim, and it is more likely than not that he was sentenced under the residual clause. The district court erred in dismissing Craven's § 2255 motion as time-barred." (citations omitted)).

And the Fifth Circuit panels in *Taylor* and *Wiese* considered precedent from other circuits applying these standards to initial motions. *See, e.g.*, *Snyder*, 871 F.3d 1122; *Beeman*, 871 F.3d 1215; *Dimott*, 881 F.3d 232; *United States v. Wilson*, 249 F. Supp. 3d 305, 310 n.8 (D.D.C. 2017) ("Defendant had not previously filed a § 2255 motion in this case, so he did not need to seek leave to file from the Court of Appeals. *See* 28 U.S.C. § 2255(h).").

And some circuits have already explicitly expanded application of – in their

view, the correct option among – these standards to an initial Section 2255 motion. *See United States v. Driscoll*, 892 F.3d 1127, 1135 (10th Cir. 2018) ("In *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018), we adopted *Beeman*'s articulation of a § 2255 movant's burden in a slightly different context. We now further adopt *Beeman*'s 'more likely than not' burden of proof here, at the merits stage of a first § 2255 challenge. Consequently, Driscoll must prove that the sentencing court, more likely than not, relied on the residual clause to enhance his sentence under the ACCA. Driscoll meets this burden. The sentencing record is ambiguous as to whether the sentencing court relied on the residual clause to enhance Driscoll's sentence, which favors neither Driscoll nor the government. But, after a review of the relevant background legal environment, we conclude that the sentencing court must have relied on the residual clause, as any reliance on the enumerated offenses clause would have violated *Taylor[ v. United States*, 495 U.S. 575 (1990)]. Thus, Driscoll has adequately shown it is more likely than not that the sentencing court relied on the residual clause to enhance his sentence." (footnote omitted)); *Garcia-Hernandez v. United States*, ___ F.3d ____, No. 17-3027, 2019 WL 507632, at *2 (8th Cir. Feb. 11, 2019) ("*Walker*'s principles govern here, at the merits stage of an initial 2255 motion. Garcia-Hernandez must 'show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement.'" (quoting *Walker*, 900 F.3d at 1015)); *see also In re Moore*, 830 F.3d 1268, 1272 (11th Cir. 2016) (per curiam) ("We grant this application because it is unclear whether the district court relied on the residual clause or other ACCA clauses in sentencing Moore, so Moore met his burden

of making out a *prima facie* case that he is entitled to file a successive § 2255 motion raising his *[Samuel] Johnson* claim. There in the district court though, a movant has the burden of showing that he is entitled to relief in a § 2255 motion – not just a *prima facie* showing that he meets the requirements of § 2255(h)(2), but a showing of actual entitlement to relief on his *[Samuel] Johnson* claim." (collecting cases)).

Regardless which standard the Court should apply – for example, "may have" or "more likely than not" – and regardless whether the Court is addressing its jurisdiction to consider the merits of a successive motion, an affirmative defense to a motion (such as limitations under 28 U.S.C. § 2255(f)), or the merits of the motion – at the outset, the Court must determine whether the right recognized in *Samuel Johnson* truly is at issue – that is, whether the violent felony at issue qualified as a predicate conviction toward the movant's ACCA sentencing enhancement under the now-invalidated residual clause.

And, while – as to a successive motion – the district court's Section 2255(h)(2) gatekeeping function often merges with its determining whether a *Samuel Johnson* claim exists, *see, e.g.*, *Perez v. United States*, 730 F. App'x 804, 810 (11th Cir. 2018) (per curiam), a true *Samuel Johnson* claim itself does not necessarily entitle its movant to relief. Instead, that sentencing error, on collateral review, only entitles a movant to relief if the error "'had substantial and injurious effect or influence in determining' [the movant's] sentence." *Driscoll*, 892 F.3d at 1132 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)); *see, e.g., id.* ("First, we determine whether the sentencing court erred by relying on the residual clause to enhance Driscoll's sentence. Second, if the

sentencing court erred, we determine whether that error 'had substantial and injurious effect or influence in determining' Driscoll's sentence." (citation omitted); *see also United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) (applying *Brecht* in a Section 2255 proceeding).

Under *Brecht*, "certain 'structural' errors," *Ellis*, 2018 WL 1005886, at *2 (quoting *Brecht*, 507 U.S. at 629-30) – defined as "defects in the constitution of the trial mechanism," such as "deprivation of the right to counsel," *Brecht*, at 629 – entitle a movant to automatic relief "once the error is proved. For other 'trial' errors, the court may grant relief only if the error 'had substantial and injurious effect or influence' in determining the outcome of the case." *Ellis*, 2018 WL 1005886, at *2 (citing *Brecht*, 507 U.S. at 629-30; then quoting *id.* at 637-38). So, even if there is true *Samuel Johnson* sentencing error, if a movant "has three predicate convictions to support his enhanced sentence as an armed career criminal under the ACCA," he is not entitled to relief. *Driscoll*, 892 F.3d at 1135-36; *see also Chavez*, 193 F.3d at 379 ("Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.").

At this stage, the Court may consider the impact of applicable statutory-interpretation decisions handed down after a movant's sentencing, such as *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See, e.g.*, *United States v. Lewis*, 904 F.3d 867, 873 (10th Cir. 2018) ("*Mathis* and other current, post-sentence cases are only applicable at the harmless error stage of review, once the movant has established the

existence of *[Samuel] Johnson* error."); *accord Driscoll*, 892 F.3d at 1136-37; *but see Peppers*, 899 F.3d at 230, 236 (holding "that, once a defendant has satisfied § 2255(h)'s gatekeeping requirements by relying on *[Samuel] Johnson*, he may use post-sentencing cases such as *Mathis*, *Descamps[ v. United States*, 570 U.S. 254 (2013)], and *[Curtis Johnson]* to support his *[Samuel] Johnson* claim because they are Supreme Court cases that ensure we correctly apply the ACCA's provisions," but then remanding to the district court to resolve whether the error was harmless under *Brecht*).

**Analysis**

In authorizing the filing of this successive Section 2255 motion, the Fifth Circuit – recognizing that its 2007 affirmance "not[ed] that Wallace's three prior convictions qualified as predicate offenses under § 924(e)" – found that, through his "conten[tion] that *[Samuel Johnson]* established a new rule of constitutional law made retroactive to cases on collateral review," Wallace "made 'a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *In re Wallace*, No. 16-10201 (5th Cir. June 6, 2016) (per curiam) [Dkt. No. 1 at 2] (citing 28 U.S.C. § 2255(h)(2); then quoting *Reyes-Requena*, 243 F.3d at 899)

But, as the Fifth Circuit also found, its "grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Wallace has failed to make the showing required to file such an application." *Id.* (citing 28 U.S.C. § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899); *see* 28 U.S.C. § 2244(b)(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."); *cf. In re Swearingen*, 556 F.3d 344, 347 (5th Cir. 2009) (per curiam) ("We reiterate that this grant is tentative in that the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits, if the court finds that the movant has not satisfied the § 2244(b)(2) requirements for the filing of such a motion." (citations omitted)); *Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1358 (11th Cir. 2007) (stating that it makes "no sense for the district court to treat [a court of appeals's] *prima facie* decision as something more than it is or to mine [the circuit court's] order for factual ore to be assayed" and directing that "[t]he district court is to decide the § 2244(b)(1) & (2) issues fresh, or in the legal vernacular, *de novo*" (citations omitted)).

Consistent with the Fifth Circuit's authorization based on Wallace's contention that, because of *Samuel Johnson*, he no longer has three predicate convictions that qualify him for an ACCA sentencing enhancement, to avoid dismissal of his Section 2255 motion, Wallace must show that, at least as to one of these convictions, he was sentenced based on the ACCA's residual clause and thereby make the showing that a claim made in his Section 2255 motion relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §§ 2244(b)(2)(A), 2255(h)(2); *see also Wiese*, 896 F.3d at 720 ("[T]he prisoner must actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law.... If the motion does not, the district court must dismiss without reaching the merits." (citing 28 U.S.C. §

2244(b)(2), (4)).

Put differently, Wallace must show that a violent felony needed to sustain his ACCA enhancement qualified as a predicate conviction under the now-invalidated residual clause, thus violating *Samuel Johnson*.

First, under the now-withdrawn panel decision in *United States v. Burris*, 896 F.3d 320 (5th Cir. 2018), *opinion withdrawn*, 908 F.3d 152 (5th Cir. 2018) (per curiam), Wallace may have been able to show that, as to his Texas robbery conviction under Section 29.02(a), the Court, at sentencing, applied the ACCA's residual clause and therefore show that he has made a true *Samuel Johnson* claim that both triggers jurisdiction over this successive motion and is a sentencing error that is prejudicial under *Brecht*. But, even if the previous panel decision in *Burris* is reinstated after *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), the Fifth Circuit has held, with the benefit of *Mathis*, "that convictions under Texas Penal Code § 29.03(a)(2)" (for aggravated robbery) qualify "as violent felony convictions under the ACCA's force clause," *United States v. Guardiola*, 738 F. App'x 329, 329 (5th Cir. 2018) (per curiam) (citing *United States v. Lerma*, 877 F.3d 628, 636 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 2585 (2018)).

So, as to the aggravated robbery conviction, even if the record at sentencing showed that the Court may have relied on the ACCA's residual clause – thus triggering jurisdiction over this successive motion – Wallace could not show prejudice under *Brecht*. *See Driscoll*, 892 F.3d at 1136-37; *Lewis*, 904 F.3d at 873.

Wallace therefore has two qualifying predicate convictions, and the Court must

turn to his predicate conviction for Texas burglary.

And, unfortunately for Wallace, like Wiese, when he was sentenced in 2003, "all of § 30.02(a) was considered generic burglary under the enumerated offenses clause of ACCA." *Wiese*, 896 F.3d at 725 (citations omitted). And, as also explained above, that the relevant legal background began to shift some five years after he was sentenced, *see id.* (citing *Constante*, 544 F.3d at 587 (holding that Section 30.02(a)(3) is not generic burglary)), "is of no consequence to determining the mindset of a sentencing judge in 2003," to determine whether Wallace has shown, at a minimum, "that the sentencing court 'may have' relied on the residual clause," *id.* at 725, 724; *see also Castro*, 2018 WL 6070373, at *2-*3.

Wallace has therefore not shown that any *Samuel Johnson* sentencing error has resulted in prejudice by showing that there are no longer three predicate violent felonies under either the ACCA's enumerated offenses clause or its elements clause to sustain his ACCA sentencing enhancement.

**Recommendation**

The Court should grant Movant David Ray Wallace's motion to reopen this action [Dkt. No. 15] and dismiss his successive Section 2255 motion under 28 U.S.C. § 2244(b)(4).

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: February 13, 2019

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
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| DAVID RAY WALLACE, | ) | |
| | ) | |
| Movant, | ) | |
| | ) | CIVIL ACTION NO. |
| VS. | ) | |
| | ) | 3:16-CV-1529-G |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

**JUDGMENT**

The court has entered its order accepting the findings, conclusions and recommendation of the United States Magistrate Judge in this case.

It is therefore **ORDERED**, **ADJUDGED** and **DECREED** that Movant David Ray Wallace's motion to reopen this action (docket entry 15) is **GRANTED**, and his successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence is **DISMISSED** under 28 U.S.C. § 2244(b)(4).

The clerk shall transmit a true copy of this judgment, together with a true copy of the order accepting the findings, conclusions and recommendation of the United States Magistrate Judge, to the parties.

March 18, 2019.

A. Joe Fish

**A. JOE FISH**
**Senior United States District Judge**

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

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| UNITED STATES OF AMERICA | ( | NUMBER 3:02-CR-328-R |
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| DAVID RAY WALLACE | ( | May 27, 2003 |

SENTENCING
BEFORE THE HONORABLE A. JOE FISH

A P P E A R A N C E S:

For the Government:
MR. MIKE GILL
Assistant United States Attorney
UNITED STATES DEPARTMENT OF JUSTICE
NORTHERN DISTRICT OF TEXAS
U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242
214/659-8600

For the Defendant:
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Assistant Federal Public Defender
Northern District of Texas
525 Griffin, Suite 629
Dallas, Texas 75202
214/729-2746

Court Reporter:
Cassidi L. Casey, CSR No. 1703
1100 Commerce Street, Rm 15D6L
Dallas, Texas 75242
214/651-9252

P R O C E E D I N G S:

THE COURT: Mr. Wallace is before me for sentencing today due to Judge Buchmeyer's unavailability due to ill health. I have received a Presentence Report concerning Mr. Wallace dated March 12th, 2003.

Mr. McLarty, have you and Mr. Wallace reviewed together a copy of that report?

MR. MCLARTY: Yes, your Honor, we have.

THE COURT: I see that on May 21, 2003, I received a document entitled Defendant's Objections to the Presentence Report.

Mr. McLarty, did you state in that submission all the inaccuracies in the report that you and Mr. Wallace found when you reviewed it together?

MR. MCLARTY: Your Honor, in my objections I stated the objections I felt were appropriate. However, I'm informed by Mr. Wallace that he has additional objections that he feels should have been raised. I declined to raise them after discussing them with him. I filed the objections I thought were appropriate.

THE COURT: Mr. Wallace, do you agree with what Mr. McLarty has just stated?

THE DEFENDANT: Well, at this time I would like to request that I be able to represent myself and raise my own objections to the PSR, that my attorney has refused to file

the objections that I have requested. I'm prepared to represent myself, if I may.

THE COURT: Mr. Wallace, it's a very serious step for a person to undertake to represent himself or herself in court. The Constitution, as you probably know, guarantees you the right to effective assistance of counsel. That Constitutional provision has been construed by the Supreme Court of the United States to give you the right to represent yourself. However, there is a federal statute which says that a person can appear in federal court either by counsel or representing himself. And that statute has been construed to mean that there is no right of hybrid representation. That is to say, you either have the right to represent yourself or you can appear by counsel, but you can't do both. If you were to ask my advice, I would caution undertaking to represent yourself because you will still be bound by the same rules and the deadlines, substantive rules of law that apply to litigants who are represented by counsel, and you will be held to those even though you may not be aware of them. I'm not going to be able to represent you myself. That's not my function here. So I can't help you if you get into trouble. So before I take action on your request to represent yourself, I want to be sure you understand the serious step that you are taking and be sure that you are prepared to live with the consequences of that decision

whether they may be.

THE DEFENDANT: Yes, sir, I am. I have some pretty serious matters that I asked him to assist me in that he refused to do so. And I feel like this involves my life, and I do need somebody to help me, and since he has refused to help me, I have no choice but to help myself.

THE COURT: Let me inquire if the government has a position on this request.

MR. GILL: Your Honor, I think the Court has admonished appropriately. We have no objection. We will state that

Mr. McLarty has represented Mr. Wallace very well throughout the entire proceedings.

THE COURT: Very well, Mr. Wallace. Somewhat reluctantly, I will grant your motion. The law does say, as I said earlier, that you have the right to represent yourself. That being the case, I don't feel that I can deny your motion.

Mr. McLarty, you may be excused from any further obligation in representing Mr. Wallace in this case.

Mr. Wallace, if you have further objections to the Presentence Report, I will hear those at this time.

THE DEFENDANT: Thank you, your Honor.

The first objection I'd like to make to the Presentence Report is Paragraph 25, offense level as a career

criminal. The reason for that is on Paragraphs 33 and 34 based upon the grounds that it is a double jeopardy clause. As a juvenile, I was charged with robbery and a theft, and all the records are showing there is one complainant, and if it is a double jeopardy clause, then the government cannot charge me under 18 Title 924 as charged in the indictment. As a juvenile, I was charged with robbery and a theft. The paperwork I have shows the complainant was the same individual on both charges. This was one offense committed, two indictments, one complainant.

THE COURT: Mr. Wallace, I'll hear all of your objections at the same time. If that's all you have to say on that paragraph. Let's go on.

THE DEFENDANT: I'll object to Paragraph 18 on factors that may warrant an upward departure.

THE COURT: I'm sorry. We're not on the same page.

THE DEFENDANT: 118. Excuse me.

THE COURT: 118. Okay.

THE DEFENDANT: It states that the defendant's conduct occurred outside a store that he had previously robbed on May 4th, 1993. At no time have I ever been convicted of robbing a store. It gives the Case Number F-8396165-J which is the robbery and the theft case that I'm claiming the double jeopardy on which is actually a theft case and not a robbery. So it's claiming that I actually

robbed the store at this location at this time, and that's incorrect. At no time have I ever robbed a store on May 4th, 1993.

THE COURT: It appears that's a misprint when it says 1993.

THE DEFENDANT: It's still not a robbery of a store. It's actually a theft.

THE COURT: Well, those two paragraphs refer to an incident on May 4, 1983.

THE DEFENDANT: Right. It says I robbed a store.

THE COURT: All right. Let's go on to the next objection.

THE DEFENDANT: 119, factors that may warrant an upward departure. It states the defendant was under a term of parole at the time of the offense. F-8685062-P, F-8892465-H, I was not currently on parole during this time. The next case number was F-9100125-R which I received a ten-year sentence fifteen years ago, and the next was F-88-926465, I also received a ten-year sentence fifteen years ago. So those three cases I was never under a term of parole hearing during the course of this offense as it states.

THE COURT: I'm sorry. Let me be sure I understand your contention, Mr. Wallace. Are you contending that you never received a term of parole in those three case

numbers or simply you were not under a term of parole?

THE DEFENDANT: That I was not under a term of parole at the time. It reads that I was under a term of parole during the course of the offense that I'm charged with today. Okay. I was not on parole for either one of those. My purpose is to show the inaccuracy of the PSR.

THE COURT: Okay. I understand your position.

Is that all of your objections?

THE DEFENDANT: No, sir, I'm objecting to the sentence. I brought up some very serious issues with my attorney at the time. At that time I had told him that Judge Buchmeyer was sleeping during the pretrial hearing. He refused to do anything. He overlooked it and said it was no big deal. I asked to get the material to show the prosecutor had to raise his voice several times to get the judge's attention, and as he's walking out the door the prosecutor asked him about my motions, and he said oh, yeah, denied. He denied the motion. During picking my jury, there was three seated in 11, 12, 13 that was laughing at the judge because of his behavior. So I advised the attorney that they were laughing at him, and he said no big deal. So now there is issues concerning the Judge's health. I have questions. I have to object to the sentencing.

That was the purpose of me requesting the attorney be dismissed because he told me he was not going to raise the

issue of the judge, and he knows I brought these things up before anything was said, but his reaction was I was making these things up.

THE COURT: Does that complete your objection?

THE DEFENDANT: Yes, sir.

THE COURT: The objections that Mr. McLarty submitted on behalf of Mr. Wallace I received on May 21st, 2003. The government submitted a statement on or about March 19, 2003, indicating it had no objections to the report. And the probation officer prepared and submitted a written addendum which I received about May 21st, 2003, responding to the objections submitted by Mr. McLarty. I am going to resolve those objections as recommended by the probation officer in the addendum to the Presentence Report.

I will adopt the addendum and to the extent not inconsistent therewith will also adopt the original Presentence Report. I will overrule the objection stated by Mr. Wallace orally in our hearing today. But Mr. Wallace, I consider that you have properly raised those objections if you wish to pursue them on appeal of this case.

And although they were not timely filed under the Local Rules of this Court, I think there were extenuating circumstances if you brought them to the attention of your attorney and he refused to bring them to the attention of the Court. So I will consider them, even though they are

untimely today, but I do not find them to be meritorious, and so I will overrule them.

At this time, Mr. Wallace, I'm ready to hear from you or anyone else you wish to present before I make a decision about your sentence.

THE DEFENDANT: Nothing further.

THE COURT: Counsel for the government have anything?

MR. GILL: Your Honor, the range in this case is two hundred thirty-five to two hundred ninety-three months. We believe the basis for upward departure is strong. So does the probation officer. We ask the Court to at the least sentence the defendant at the top of the sentencing guidelines. This is the most extreme. The Court is aware of what the defendant was in possession of at the time of his arrest. His repeated behavior over the years shows a constant disregard for the law, and we believe a staunch sentence is warranted in this case.

THE COURT: Thank you, Mr. Gill.

Mr. Wallace is before me for sentencing after being convicted by a jury of being a felon in possession of a firearm. By statute this crime carries a sentence of fifteen years to life and a two hundred fifty thousand dollar fine.

This is a guidelines case, and as the guidelines were computed in the Presentence Report the total offense

level is 33 and the Criminal History Category is VI, producing a guideline range for a custody sentence of two hundred thirty-five to two hundred ninety-three months.

The probation officer, as stated by Mr. Gill just now, did discuss at Paragraphs 117 to 119 certain factors that might warrant an upward departure in this case. However, I'm not going to upwardly depart, but I will, as requested by Mr. Gill just now, choose a sentence at the upper end of the guideline range and will order that Mr. Wallace be committed to the custody of the Attorney General or his authorized representative for a term of two hundred ninety-three months.

The guideline range for a fine in this case is seventeen thousand five hundred dollars to one hundred seventy-five thousand dollars. I'm not going to impose a fine within this range or any other amount because it does not appear to me that Mr. Wallace has the financial resources to pay a fine.

I will also not order any restitution in this case because Mr. Wallace appears to lack the resources to pay restitution and also because Paragraph 112 of the Presentence Report states that restitution is not applicable in this case.

The guidelines here provide for a term of supervised release range of three to five years. Staying

within that range, I will order that upon his release from custody Mr. Wallace serve a term of supervised release of five years on the following conditions:

First, while on supervised re release, Mr. Wallace shall not commit any other federal, state or local crime and shall not illegally possess a controlled substance.

Second, Mr. Wallace shall refrain from any unlawful use of a controlled substance. He shall submit to one drug test within fifteen days of his release from custody and at least two periodic drug tests thereafter as directed by his probation officer.

Third, while on supervised release, Mr. Wallace shall also comply with the standard conditions recommended by the United States Sentencing Commission and shall comply with the following additional conditions:

First, Mr. Wallace shall not possess a firearm as that term is defined in Title 18, United States Code, Section 921.

Second, Mr. Wallace shall report in person to the Probation Office in the district to which he is released within seventy-two hours of his release from custody by the Bureau of Prisons.

Third, Mr. Wallace shall participate in a program approved by the Probation Office for the treatment of narcotic or drug or alcohol dependency which will include

testing for the detection of substance use or abuse.

Mr. Wallace shall abstain from the use of alcohol and all other intoxicants during and after completion of treatment.

I will further order that he contribute to the cost of service rendered to him in this program at a rate of at least ten dollars per month.

Fourth, Mr. Wallace shall provide to his probation officer any requested financial information.

I will further order that Mr. Wallace pay the special assessment of one hundred dollars required by 18 United States Code, Section 3013 (a)

THE COURT: Mr. Wallace, this case went to trial by a jury. I am required to advise you of your right to appeal. It is as follows: "If the defendant pleaded not guilty and was convicted, after sentencing the Court must advise the defendant of the right to appeal conviction."

What this means, Mr. Wallace, is if you are dissatisfied with any part of the case while it was in this Court, you have the right to appeal to a higher court which in this instance is the Court of Appeals for the Fifth Circuit based in New Orleans, Louisiana. You take such an appeal by filing with the Clerk of this Court a document called Notice of Appeal.

This document must be filed under the Rules of

Appellate Procedure not later than two days from today. If you know you wish to take an appeal, the forms are available from our clerk's office which you can fill out and file with the Clerk of the Court. I urge you to promptly take care of this matter if you are inclined to appeal so that you do not lose your right to appeal by the simple passage of time.

If you have been found eligible for court-appointed counsel, you can apply to have court-appointed counsel on appeal, and if you are found to be eligible for that status, counsel will be appointed for you to handle your appeal at no expense to yourself. Also, if you are found eligible for that status, you can request and receive a copy of the transcript of the trial or any documentation necessary to support any of the points that you wish to raise on appeal.

The matter that you referred to in your oral objections today at the hearing concerning Judge Buchmeyer's conduct at the trial and the pretrial proceedings are matters that you may wish to raise on appeal. Even though I do not think they were relevant to sentencing today, they might be relevant to points you wish to raise on appeal.

If you need a transcript of the trial proceedings, you can obtain such a transcript by filling out the necessary paperwork, again, available from our clerk's office which must be directed to the court reporter who took stenographic notes during the trial and who will be able to transcribe the

proceedings from the trial from those notes.

I believe that completes our proceedings for today in United States against David Ray Wallace. Mr. Wallace, are you aware of any other matters that I need to cover in imposing sentence today?

THE DEFENDANT: No, sir, other than I am requesting counsel for my appeal.

THE COURT: Very well, I will refer that request to a magistrate judge to consider at the earliest available opportunity.

Counsel for the government know of anything else I need to cover?

MR. GILL: No, your Honor.

THE COURT: Ladies and Gentlemen, this completes our proceedings for today in the case of United States David Ray Wallace.

Mr. Gill, if you have no further business with us, you may be excused.

MR. GILL: Thank you, your Honor.

C E R T I F I C A T I O N

I, Cassidi L. Casey, certify that during the proceedings of the foregoing-styled and -numbered cause, I was the official reporter and took in stenotypy such proceedings and have transcribed the same as shown by the above and foregoing pages 1 through 15 and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

CASSIDI L. CASEY
UNITED STATES DISTRICT REPORTER
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
BOARD NUMBER 1703

# United States District Court

**Northern District of Texas**
Dallas Division

UNITED STATES OF AMERICA

v. Case Number 3:02-CR-328-R(01)

DAVID RAY WALLACE
Defendant.

## JUDGMENT IN A CRIMINAL CASE
**(For Offenses Committed On or After November 1, 1987)**

The defendant, DAVID RAY WALLACE, was represented by Carlton C. McLarty, Assistant Federal Public Defender.

The defendant was found guilty on Count 1 by a jury verdict on January 29, 2003, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

| Title & Section | Nature of Offense | Date of Offense | Count Number(s) |
|---|---|---|---|
| 18 USC §§ 922(g)(1) & 924(e) | Felon in Possession of a Firearm | August 21, 2002 | 1 |

As pronounced on May 27, 2003, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100, for Count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 29th day of May, 2003.

A. JOE FISH
CHIEF JUDGE

Defendant's SSN: 454-33-0170
Defendant's Date of Birth: 7-16-66
Defendant's Address: Lew Sterrett Justice Center, 500 Commerce Street, 2WL-13, Dallas, Texas 75202
Defendant's USM No: Unknown

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO-HUNDRED AND NINETY-THREE (293)** months.

The defendant shall remain in custody pending service of sentence.

**RETURN**

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: DAVID RAY WALLACE Judgment--Page 3 of 4
Case Number: 3:02-CR-328-R(01)

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5)** years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

19-10589.364

## SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic or drug or alcohol dependency which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. It is ordered that the defendant contribute to the costs of services rendered (co-payment) at a rate of at least $ 10 per month.

The defendant shall provide to the U.S. Probation Officer any requested financial information.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 03-10581
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID RAY WALLACE,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:02-CR-328-ALL-R

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Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:*

David Ray Wallace appeals from his jury-trial conviction and sentence for possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1), 924(e). Wallace argues that the district court erred in finding that he consented to a search of his person. The evidence, viewed in the light most favorable to the prevailing party, supports the district court's findings and denial of Wallace's motion to suppress. See United States v.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Shelton, 337 F.3d 529, 532, petition for cert. filed, 72 U.S.L.W. 3393 (U.S. Nov. 24, 2003) (No. 03-781).

Wallace further argues that the district court erred in enhancing his sentence pursuant to 18 U.S.C. § 924(e). This court reviews the issue de novo. See United States v. Martinez-Cortez, 988 F.2d 1408, 1410 (5th Cir. 1993). The presentence report reveals that Wallace had three convictions for aggravated robbery which served as predicate offenses for the sentence enhancement. See United States v. Munoz, 150 F.3d 401, 419 (5th Cir. 1998). The district court did not err.

Finally, Wallace challenges the constitutionality of 18 U.S.C. § 922(g). He concedes that his argument is foreclosed by circuit precedent. This court has repeatedly held that the constitutionality of 18 U.S.C. § 922(g) is not open to question. United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001).

AFFIRMED.