No. _____

In the

Supreme Court of the United States

RODNEY BERNARD ALLEN,
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

J. MATTHEW WRIGHT
* *COUNSEL OF RECORD*
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
(806) 324-2370
MATTHEW_WRIGHT@FD.ORG

QUESTIONS PRESENTED

1. In Texas, a defendant commits simple robbery if, during the course of a theft, he recklessly causes someone else to suffer bodily injury or knowingly causes a victim to fear imminent bodily injury (even if he never meets, confronts, or interacts with the victim).

Could reasonable jurists debate whether the crime defined by Texas Penal Code § 29.02(a) is categorically violent under the Armed Career Criminal Act's elements clause, 18 U.S.C. § 924(e)(2)(B)(i)?

2. After the Fifth Circuit granted prefiling authorization for the successive motion to vacate, 28 U.S.C. § 2255(h), the parties contested the case and the district court decided the case solely on the merits—whether the robbery convictions remained violent felonies without the ACCA's unconstitutional residual clause. But when Mr. Allen later sought a Certificate of Appealability to challenge the district court's adverse merits ruling, the Fifth Circuit *sua sponte* invoked its decision in *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). Under *Clay*, a successive § 2255 movant who invokes the new rule in *Johnson v. United States*, 576 U.S. 591 (2015), must prove by a preponderance of the evidence that that his sentencing judge subjectively relied upon the ACCA's residual clause at the original sentencing hearing.

Could reasonable jurists debate the Fifth Circuit's *sua sponte* application of *Clay* to this case?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

RELATED PROCEEDINGS

United States v. Allen, No. 3:96-CR-256 (N.D. Tex.)

United States v. Allen, No. 97-10339 (5th Cir.)

Allen v. United States, No. 97-8200 (U.S.)

United States v. Allen, No. 3-05-CV-1477 (N.D. Tex.)

United States v. Allen, No. 3-08-CV-0453 (N.D. Tex.)

Allen v. Rhodes, No. 1:13-CV-1315 (D. Colo.)

Allen v. Rhodes, No. 13-1331 (10th Cir.)

In re Allen, No. 16-10339, consolidated with No. 16-10740 (5th Cir.)

Allen v. United States, No. 3:16-CV-336 (N.D. Tex.)

United States v. Allen, No. 19-11000

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Bernard Allen asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion denying a Certificate of Appealability was not selected for publication. It is reprinted on pages 1a–2a of the Appendix. The district court's order denying relief on the merits is available at 2019 WL 3006430 and is reprinted on pages 5a–10a of the Appendix.

JURISDICTION

The Fifth Circuit entered the order denying a Certificate of Appealability on November 10, 2020. App., infra, 1a. On March 19, 2020, this Court extended the deadline to file petitions for certiorari in all cases to 150 days from the date of the order giving rise to the petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Armed Career Criminal Act, 18 U.S.C. § 924(e); Texas Penal Code § 29.02(a); and 28 U.S.C. §§ 2255(h) and 2244(b). The Armed Career Criminal Act provides:

> (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, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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

. 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.

Title 28, Section 2255(h) of the U.S. Code provides:

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(b) provides:

> (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.

STATEMENT

1. In 1996, a jury convicted Mr. Allen of possessing a firearm after felony conviction. App., *infra*, 5a. Normally, that offense carries a maximum possible sentence of ten years in prison followed by three years of supervised release. 18 U.S.C. §§ 922(g)(1), 924(a)(2), 3583(b), 3559(a)(3). The district court decided to apply the Armed Career Criminal Act enhancement, which meant Mr. Allen faced a mandatory minimum sentence of fifteen years in prison and a maximum possible sentence of life

in prison and five years of supervised release. 18 U.S.C. §§ 924(e)(1), 3583(b), 3559(a)(1). The court concluded that his prior Texas convictions for simple and aggravated robbery were violent felonies. The Fifth Circuit affirmed his conviction on direct appeal. *United States v. Allen*, 136 F.3d 137 (Table), 1998 WL 30039 (5th Cir. 1998). Previous attempts at collateral attack failed.

2. In July 2016, the Fifth Circuit granted Mr. Allen prefiling authorization for a successive motion to vacate under 28 U.S.C. § 2255(h)(2). App., *infra*, 3a–4a. The case was then transferred to the district court. App., *infra*, 4a.

3. While his authorized motion was pending, Mr. Allen completed service of his extended prison sentence and began serving his term of supervised release on August 22, 2018.

4. The district court ultimately denied Mr. Allen's authorized motion based on the Fifth Circuit's decision in *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019), pet. for cert. pending, No. 19-6186 (filed Oct. 3, 2019). The *Burris* panel had originally held that Texas simple robbery could not satisfy the ACCA's elements clause and was not a violent felony. *See United States v. Burris*, 892 F.3d 801 (5th Cir. 2018). That would mean Mr. Allen was entitled to collateral relief from his ACCA-enhanced sentence. But while this case and *Burris* were pending, the Fifth Circuit decided to "significantly change[ ]" its "ACCA jurisprudence." *Burris*, 920 F.3d at 952 (discussing *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc)). Based on those changes, the court held in *Burris* that all forms of Texas robbery were categorically violent under the elements clause. The district court applied the more

recent *Burris* holding, denying Mr. Allen's motion on the merits. App., *infra*, 8a. The district court also denied a certificate of appealability. App., *infra*, 9a-10a.

5. Mr. Allen moved in the Fifth Circuit for a Certificate of Appealability. The court denied that motion for a reason that the Government never even raised: "Reasonable jurists would not debate that Allen failed to show that it was more likely than not that he was sentenced under the ACCA's residual clause." App., *infra*, 1a–2a (citing *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019)). This timely petition follows.

REASONS TO GRANT THE PETITION

I. IF THIS COURT VACATES THE FIFTH CIRCUIT'S DECISION IN *BURRIS*, IT SHOULD VACATE THE FIFTH CIRCUIT'S DECISION HERE AS WELL.

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 v. United States*, 140 S. Ct. 1262 (2020). 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 defines robbery in terms of injury, not application of force. It can be committed recklessly and without a physical confrontation.

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 robber 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).

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 also robbery.

The most recent *Burris* decision 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*. Given that the district court relied explicitly and exclusively on *Burris* to hold that Mr. Allen's robbery conviction was a violent felony, the Court should hold this petition until *Burris* is decided. App., *infra*, 8a.

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

Mr. Allen 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. Allen's motion are debatable.

Respondent will probably argue that the Court should not hold this petition for *Burris* because the Fifth Circuit's denial of COA was based on a different ground—Mr. Allen's failure to "show that it was more likely than not that he was sentenced under the ACCA's residual clause." App., *infra*, 1a. As shown below, reasonable jurists could surely debate the Fifth Circuit's *sua sponte* application of its gatekeeping

rules to this case. But the wiser course would be to remand for further consideration in light of the forthcoming decisions in *Burris* and *Borden*. Once those decisions establish that Mr. Allen's ACCA sentence is unlawful, he will probably be able to convince a panel or the en banc Court to issue a COA as to the gatekeeping issue.

There are too many active and entrenched circuit splits at work on the gatekeeping question to call it beyond further debate. This is especially true where neither the Government nor the district court suggested that Mr. Allen failed to satisfy the gatekeeping standard. The parties chose to contest the case solely on the merits; the district court resolved the case on the merits; and it was therefore inappropriate for the Fifth Circuit to invoke a dubious and debatable procedural ruling *sua sponte* to deny a COA.

To the extent there is any doubt about this, the Fifth Circuit recently granted a defendant's motion for reconsideration and issued a COA on the following question:

> (1) What burden, if any, must a movant satisfy in district court to maintain a successive motion under 28 U.S.C. § 2255 and *Johnson v. United States*, 135 S. Ct. 2551 (2015) following the Court of Appeals' preliminary authorization, as compared to the burden to show entitlement to relief under § 2255 and *Johnson*?

Order on Mot. for Reconsideration, *United States v. Edmonds*, No. 19-11007 (5th Cir. Mar. 30, 2021). This shows that, contrary to the decision below, the Fifth Circuit recognizes that its gatekeeping jurisprudence is up for reasonable debate. Therefore, this Court should hold this petition and then remand for further consideration in light of *Borden*, *Burris*, or both.

II. ALTERNATIVELY, THE COURT SHOULD VACATE THE DECISION BELOW AND INSTRUCT THE FIFTH CIRCUIT TO ISSUE A COA.

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. As such, it would be appropriate and fully consistent with Supreme Court Rule 10 to grant certiorari and resolve these conflicts in this case.

However, the Court need not do that. The Fifth Circuit did not simply take sides on those issues in the decision below: the Court *sua sponte* invoked its dubious and debatable rules to deny a COA. And the very same circuit splits that would justify a plenary grant demonstrate that the issue is at least debatable among reasonable jurists.

A. The lower courts are hopelessly divided.

Federal post-conviction review of *state court* convictions and sentences differs markedly from post-conviction review of *federal* convictions and sentences. State court prisoners must file a petition for habeas corpus, and they must jump through all manner of hoops arising from statutory and constitutional limitations on federal courts' interference with the business of state courts. Among those hoops is a series of procedures required where the offender seeks to file a second or successive federal habeas corpus petition. *See* 28 U.S.C. § 2244(b). He must secure prefiling

authorization from the Circuit Court that his proposed petition "relies on" either new evidence or a new, retroactive rule of constitutional law, and once he does so, he must also convince the *district court* that his motion satisfies § 2244. *See* 28 U.S.C. § 2244(b)(4).

Federal prisoners have it (a little) easier. Without any worries about federalism—and to ensure that sentences governed by federal law are consistent with federal law—Congress provided more authority for court to tinker with final federal sentences under § 2255 than it granted to review state-court convictions under habeas corpus. Section 2255 contains a similar pre-filing authorization requirement for "second or successive" motions, 28 U.S.C. § 2255(h). Before filing a second or successive motion, the federal prisoner's proposed motion "must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain" either new evidence of innocence or:

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). The Circuit courts appear to agree that this scheme contemplates a second review in the district court similar to § 2244(b)(4), even though that is not required by statute. But they don't agree on much else.

1. The Circuits are divided over whether the substantive requirements for a successive motion are "jurisdictional."

This Court "has endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). The difference between a jurisdictional rule and a non-jurisdictional rule is important:

> When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety. "[M]any months of work on the part of the attorneys and the court may be wasted." Courts, we have said, should not lightly attach those "dras-tic" consequences to limits Congress has enacted.

Id. (citations omitted).

The decision below, though consistent with existing Fifth Circuit precedent, violates every one of those admonitions. The Fifth Circuit considers the § 2244 gatekeeping analysis to be "jurisdictional." *See, e.g., In re Davila*, 888 F.3d 179, 183 (5th Cir. 2018) ("We have previously described Section 2244 as establishing two jurisdictional 'gates' through which a petitioner must proceed to have the merits of his successive habeas claim considered."); *Clay*, 921 F.3d at 554 ("Where a prisoner fails to make the requisite showing before the district court, the district court lacks jurisdiction and must dismiss his successive petition without reaching the merits."). Thus, the Court felt obligated to raise its gatekeeping rules in this case, even though the Government and the district court never mentioned those rules.

But the Sixth Circuit has held that the substantive gatekeeping standards are non-jurisdictional. After hearing detailed argument about jurisdiction (including the Government's concession that this was merely a claims-processing requirement), the Sixth Circuit recognized "that the substantive requirements of § 2255(h) are nonjurisdictional." *Williams*, 927 F.3d at 434. Like Mr. Allen, the defendant-movant-appellant in *Williams* "secured" prefiling authorization from the Court of Appeals

before filing his successive motion under § 2255. *Id.* at 434 n.4; *see* App., *infra*, 3a–4a. That was the only "jurisdictional" prerequisite for securing a ruling in district court.

Williams recognized that *Gonzalez* provides "the closest analogy" for this situation. *Id.* at 437. Just as *Gonzalez* held that "[a] defective COA is not equivalent to the lack of any COA," 565 U.S. at 143, *Williams* held that a "defective" authorization order from the Court of Appeals (e.g., one that authorizes a motion that fails to "contain" the new rule in *Johnson*) is not the same thing as having no authorization order. 927 F.3d at 434–439 ("Obtaining authorization to file a second or successive § 2255 motion maps onto this analysis tightly.").

Williams then rejected the argument that § 2244(b)(4) somehow gives rise to a jurisdictional requirement of "post-authorization vigilance." *Id.* at 438. Section 2255 governs motions by federal prisoners, and its substantive requirements are nonjurisdictional. In both Sections—2244 and 2255—the jurisdictional requirements are "procedural," but the substantive requirements are not. *Id.* at 438–439 ("We therefore hold that § 2244(b)(4) does not impose a jurisdictional bar on a federal prisoner like Williams seeking relief under § 2255 either.).

For its part, the Government agrees with the Sixth Circuit and with Mr. Allen on this point—the district-court gatekeeping analysis is *not* jurisdictional. *See, e.g.*, U.S. Notice of Change in Litigating Position, *United States v. Gresham*, No. 4:16-CV-519 (N.D. Tex. filed Feb. 15, 2018) ("[T]he government no longer takes the position that this Court's gatekeeping function under 28 U.S.C. § 2244(b)(2)(A) is a juris-

dictional one."). The Government's argument on that score is quite persuasive. See U.S. Letter Brief, *Williams v. United States*, No. 17-3211 (6th Cir. filed June 14, 2018); accord Leah M. Litman & Luke C. Beasley, *Jurisdiction and Resentencing: How Prosecutorial Waiver Can Offer Remedies Congress Has Denied*, 101 Cornell L. Rev. Online 91, 107 (2016). Petitioner's counsel assumes that Respondent will say so in this proceeding, too.

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

Leaving aside whether the district-court gatekeeping standard is a jurisdictional rule or a waivable claims processing rule, the lower courts are also divided about the gatekeeping standard itself. This split 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., 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); *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. Until it does, however, the issue is *by definition* debatable among reasonable jurists.

B. The Fifth Circuit is wrong about the district-court gatekeeping standard.

A federal court's "'obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584, 591 (2013)). But the Fifth Circuit's strict application of the gatekeeping standard, which that court classifies as "jurisdictional," finds no support in any statute, much less a clearly jurisdictional statute. Left undisturbed, the Fifth Circuit will continue to refuse to exercise jurisdiction over post-conviction challenges that Congress has plainly provided. This case typifies the "drastic" consequences that flow from mislabeling a requirement as jurisdictional. *See Gonzalez*, 565 U.S. at 141.

1. The Fifth Circuit's rule leads to exactly the kind of waste this Court warned about in *Gonzales*: "And it would be passing strange if, after a COA has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge its 'substantial[ity]' to verify its jurisdiction. That inquiry would be largely duplicative of the merits question before the court." *Gonzalez*, 565 U.S. at 143 (citations omitted, emphasis added).

Just so here. A three-judge panel of that court granted pre-filing authorization, recognizing that Mr. Allen's motion "contain[ed]" the new constitutional rule in

Johnson v. United States, 576 U.S. 591 (2015). App., *infra*, 3a–4a; the parties and the district court labored over the case *for three years*, with the district court issuing a merits decision in July 2019. App., *infra*, 5a–10a. That merits decision depended upon the Fifth Circuit's decision in *Burris*, App., *infra*, 8a, and it should be reversed if *Burris* is vacated. Yet the Fifth Circuit *sua sponte* decided to deny COA because Mr. Allen could not "prove" what the district court was thinking about when it sentenced him.

2. The ruling below represents an unacceptable departure from the party presentation principle. That principle demands that courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). But that's not what happened here. The Fifth Circuit refused to consider whether the merits were debatable because, in its view, Mr. Allen did not comply with an extra-statutory requirement—to somehow "show that it was more likely than not that he was sentenced under the ACCA's residual clause" App., *infra*, 1a. The Government had never requested such proof, and thus Mr. Allen had not made any attempt to provide it. Yet the Fifth Circuit was so confident in its view that it threw all the previous work and declared that no reasonable jurist could disagree. App., *infra*, 1a–2a. Here, as in *Sineneng-Smith*, the Court's "takeover of the appeal" was an abuse of discretion. 140 S. Ct. at 1581.

3. Given the drastic consequences attached to the "jurisdictional" label, this Court requires a *clear statement* from Congress: "A rule is jurisdictional if the

Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional. But if Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Gonzalez*, 565 U.S. at 141–142. As the Government has argued elsewhere, and as the Sixth Circuit held in *Williams*, the substantive gatekeeping rules for successive § 2255 motions are nonjurisdictional.

4. This Court held in *James* that the application of the ACCA's residual clause was a question of *statutory interpretation*, not a "judicial factfinding." *James v. United States*, 550 U.S. 192, 213 (2007). So it is hard to believe that the same court would later have to find facts *about what it was thinking about* when trying to decide whether an ACCA sentence is illegal or unconstitutional. The better view is that a defendant is entitled to collateral relief under *Johnson* if his ACCA sentence would be lawful with the residual clause but unlawful without it. At a minimum, the questions are debatable enough to warrant the issuance of a COA.

CONCLUSION

Petitioner asks that this Court hold the petition until *Burris* is decided, then grant the petition and vacate the decision below.

Respectfully submitted,

J. MATTHEW WRIGHT
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
500 SOUTH TAYLOR STREET, SUITE 110
AMARILLO, TEXAS 79101
MATTHEW_WRIGHT@FD.ORG
(806) 324-2370

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