

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROLANDO VILLARREAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MICHAEL HERMAN
First Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTIONS PRESENTED

- I. Whether a statute has as an element the use of force against the person of another when a conviction under that statute can be based on a reckless mental state.¹
- II. Whether reasonable jurists could debate the district court's decision to dismiss Mr. Villarreal's motion to vacate.

¹ The petitions for a writ of certiorari in *Alan Victor Gomez Gomez v. United States*, No. 19-5325 (filed July 25, 2019), *Jose Lara-Garcia v. United States*, No. 19-5763 (filed Aug. 28, 2019), *Javier Segovia-Lopez v. United States*, No. 19-6025 (filed Sept. 20, 2019), among others, raise the same issue as is raised in this petition with respect to whether Texas's assault and aggravated assault statutes define an offense that has as an element the use, attempted use or threatened use of physical force.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Villarreal, Case No. 7:11-CR-1377 (S.D. Tex.)

United States v. Villarreal, Case No. 12-41117 (5th Cir.)

Villarreal v. United States, Case. No. 13-5270 (U.S.)

Villarreal v. United States, Case No. 7:16-CV- 299 (S.D. Tex.)

United States v. Villarreal, Case No. 19-40811 (5th Cir.)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
LIST OF DIRECTLY RELATED CASES	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	v
PRAYER	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
18 U.S.C. § 924	2
28 U.S.C. § 2253	2
28 U.S.C. § 2255	3
Tex. Penal Code § 22.01. Assault	4
Tex. Penal Code § 22.02. Aggravated assault	4
STATEMENT OF THE CASE	5
A. Original proceedings	5
B. Current proceedings	7
BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT	11
REASONS FOR GRANTING THE PETITION	12

TABLE OF CONTENTS – (cont'd)

	Page
I. The Court should hold this petition pending resolution of <i>Borden</i>	12
A. Texas's assault and aggravated assault statutes are defined in terms of injury, not application of force. Both can be committed recklessly.....	12
B. A decision in favor of Borden in <i>Borden v. United States</i> , No. 19- 5410, should overturn the COA denial.....	15
II. If Texas's aggravated assault is not categorically a violent felony, then the procedural merits of Mr. Villarreal's petition are debatable	16
CONCLUSION	20
APPENDIX A: Order of the Court of Appeals Denying Certificate of Appealability, <i>United States v. Villarreal</i> , 19-40811 (slip op.)	21
Appendix B: Magistrate Judge Report and Recommendation	23
Appendix C: District Court Judgment Dismissing § 2255 Petition	54

TABLE OF CITATIONS

	Page
CASES	
<i>Beeman v. United States</i> , 871 F.3d 1215 (11th Cir. 2017)	8, 16, 18
<i>Borden v. United States</i> , 140 S. Ct. 1262 (2020)	<i>passim</i>
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	15
<i>Cross v. United States</i> , 892 F.3d 288 (7th Cir. 2018)	8, 16
<i>Dimott v. United States</i> , 881 F.3d 232 (1st Cir. 2018)	8, 17
<i>Golinveaux v. United States</i> , 915 F.3d 564 (8th Cir. 2019)	18
<i>Johnson v. United States</i> , 576 U.S. 591 (2015)	<i>passim</i>
<i>Landrian v. State</i> , 268 S.W.3d 532 (Tex. Crim. App. 2008)	13
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	<i>passim</i>
<i>McNair v. State</i> , No. 02-10-00257-CR, 2011 WL 5995302 (Tex. App.—Fort Worth Nov. 23, 2011, no pet.)	13
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	15
<i>Pogue v. State</i> , No. 05-12-00883-CR, 2013 WL 6212156 (Tex. App.—Dallas Nov. 27, 2013, no pet.)	13
<i>Quarles v. United States</i> , 139 S. Ct. 1872 (2019)	8
<i>Shea v. United States</i> , 976 F.3d 63 (1st Cir. 2020)	17

TABLE OF CITATIONS – (cont'd)

	Page
CASES – (cont'd)	
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000)	15
<i>Stanley v. State</i> , 470 S.W.3d 664 (Tex. App.—Dallas, no pet.)	13
<i>Tyra v. State</i> , 897 S.W.2d 796 (Tex. Crim. App. 1995)	13
<i>United States v. Al-Muwakkil</i> , 983 F.3d 748 (4th Cir. 2020)	19
<i>United States v. Clay</i> , 921 F.3d 550 (5th Cir. 2019)	8, 17
<i>United States v. Fields</i> , 863 F.3d 1012 (8th Cir. 2017).....	14
<i>United States v. Griffin</i> , 946 F.3d 759 (5th Cir. 2020)	15
<i>United States v. Howell</i> , 838 F.3d 489 (5th Cir. 2016)	13
<i>United States v. London</i> , 937 F.3d 502 (5th Cir. 2019), <i>cert. denied</i> 140 S. Ct. 1140 (2020).....	17
<i>United States v. Middleton</i> , 883 F.3d 485 (4th Cir. 2018)	14
<i>United States v. Peppers</i> , 899 F.3d 211 (3d Cir. 2018)	18
<i>United States v. Rose</i> , 896 F.3d 104 (1st Cir. 2018)	14

TABLE OF CITATIONS – (cont’d)

	Page
CASES – (cont’d)	
<i>United States v. Snyder</i> , 871 F.3d 1122 (10th Cir. 2017)	8, 16, 18
<i>United States v. Villarreal</i> , 519 Fed. Appx. 236 (5th Cir. 2013) (unpublished)	6
<i>United States v. Wiese</i> , 896 F.3d 720 (5th Cir. 2018)	8-9, 17
<i>United States v. Windley</i> , 864 F.3d 36 (1st Cir. 2017)	14
<i>Venegas v. State</i> , 560 S.W.3d 337 (Tex. App.—San Antonio 2018, no pet.)	13-14
<i>Villarreal v. United States</i> , 571 U.S. 906 (2013)	6
<i>Waagner v. United States</i> , 971 F.3d 647 (7th Cir. 2020), <i>cert. denied</i> , ____ S. Ct. ___, 2021 WL 161103 (Jan. 19, 2021)	19
<i>Walker v. State</i> , 897 S.W. 2d 812 (Tex. Crim. App. 1995)	13

STATUES AND RULES

18 U.S.C. § 922(g)	2
18 U.S.C. § 922(g)(1)	2, 6
18 U.S.C. § 924	iii
18 U.S.C. § 924(a)(2)	6

TABLE OF CITATIONS – (cont'd)

	Page
STATUTES AND RULES – (cont'd)	
18 U.S.C. § 924(e)	<i>passim</i>
18 U.S.C. § 924(e)(1)	2
18 U.S.C. § 924(e)(2)	2
18 U.S.C. § 924(e)(2)(B)	2
18 U.S.C. § 924(e)(2)(B)(i)	2, 7, 15
18 U.S.C. § 924(e)(2)(B)(ii)	2, 7
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2253	iii
28 U.S.C. § 2253(c)	2
28 U.S.C. § 2253(c)(1)	2
28 U.S.C. § 2253(c)(1)(A)	2
28 U.S.C. § 2253(c)(1)(B)	3
28 U.S.C. § 2253(c)(2)	3, 15
28 U.S.C. § 2253(c)(3)	3
28 U.S.C. § 2253(f)(3)	8, 10, 16-17
28 U.S.C. § 2255	<i>passim</i>
28 U.S.C. § 2255(a)	3
28 U.S.C. § 2255(f)	3, 7, 19

TABLE OF CITATIONS – (cont'd)

	Page
STATUTES AND RULES – (cont'd)	
28 U.S.C. § 2255(f)(1)	3
28 U.S.C. § 2255(f)(2)	3
28 U.S.C. § 2255(f)(3)	3, 16
28 U.S.C. § 2255(f)(4)	3
28 U.S.C. § 2255(h)	8, 17-18
Sup. Ct. R. 13.1	1
Tex. Penal Code § 22.01	iii, 4, 12
Tex. Penal Code § 22.01(a)	4, 12
Tex. Penal Code § 22.01(a)(1)	4
Tex. Penal Code § 22.01(a)(2)	4
Tex. Penal Code § 22.01(a)(3)	4
Tex. Penal Code § 22.02	iii, 4
Tex. Penal Code § 22.02(a)	4, 12
Tex. Penal Code § 22.02(a)(1)	4
Tex. Penal Code § 22.02(a)(2)	4

PRAYER

Petitioner Rolando Villarreal prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit. Alternatively, this Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020) (granting the petition for writ of certiorari limited to Question 1), and then dispose of the petition as appropriate.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability in Mr. Villarreal’s case is attached to this petition as Appendix A. The report and recommendation of the magistrate judge recommending dismissal of Mr. Villarreal’s petition under § 2255 is attached as Appendix B. The judgment of the district court dismissing Mr. Villarreal’s § 2255 petition is attached as Appendix C.

JURISDICTION

The Fifth Circuit issued its order on December 29, 2020. *See* Appendix A. This petition is filed within 150 days after the date of the Fifth Circuit’s order and thus is timely. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

(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).

(e)(2) As used in this subsection—

* * *

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise presents a serious potential risk of physical injury to another

* * * *

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

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

- (A) the final order in a habeas corpus proceeding in which the

detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

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

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

* * * *

This case also involves the interpretation and application of 28 U.S.C. § 2255

which provides, in relevant part:

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

* * * *

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

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

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

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

collateral review; or

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

* * * *

This case also involves the interpretation and application of the following laws of the State of Texas:

Tex. Penal Code § 22.01. Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

* * * *

Tex. Penal Code § 22.02. Aggravated assault

(a) A person commits an offense if the person commits assault as defined in [Tex. Penal Code] § 22.01 and the person:

(1) causes serious bodily injury to another, including the person's spouse; or

(2) uses or exhibits a deadly weapon during the commission of the assault.

* * * *

STATEMENT OF THE CASE

The single-judge order denying a Certificate of Appealability (Appendix A) is based on the judge’s conclusion that Mr. Villarreal did not make the required showing that reasonable jurists could debate whether his petition states a valid claim of the denial of a constitutional right. The constitutional right that Mr. Villarreal asserted in his petition was the right to be free of a sentencing enhancement based on an unconstitutional statute, namely, the residual clause of 18 U.S.C. § 924(e), as applied to his prior convictions under Texas law for burglary of a habitation and aggravated assault, in light of this Court’s decision in *Johnson v. United States*, 576 U.S. 591 (2015). This Court is still in the middle of that debate with respect to Mr. Villarreal’s aggravated assault convictions. The Court granted certiorari in *Borden v. United States*, 140 S. Ct. 1262 (2020) to decide whether an offense that can be committed by recklessly satisfies the ACCA’s elements clause. Texas’s assault statute proscribes such an offense. The Court, therefore, should vacate the Fifth Circuit’s order denying a certificate of appealability on the basis that the issue at the center of Mr. Villarreal’s petition is debatable.

The Fifth Circuit did not address the underlying procedural issues based on which the district court dismissed Mr. Villarreal’s petition as untimely. For the reasons stated below, those issues are equally debatable, so that a certificate of appealability should have issued.

A. Original proceedings

On September 8, 2011, a federal grand jury in the McAllen Division of the Southern District of Texas returned a one-count indictment charging Petitioner-Appellant Rolando

Villarreal with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Although initially admonished at his plea of guilty on February 6, 2012, that the maximum prison sentence that he was facing for this charge was 10 years, the district court ultimately determined that Mr. Villarreal was an armed career criminal under 18 U.S.C. § 924(e) (“ACCA”), based on Mr. Villarreal’s prior convictions under Texas law for burglary of a habitation and two separate cases of aggravated assault. The PSR found that the statutory mandatory minimum term of imprisonment based on those convictions was 15 years. Mr. Villarreal objected on the basis that the Texas offense of burglary of a habitation was broader than the generic definition of “burglary” because of the expansive definition of “owner” used in that statute. At sentencing, the district court overruled Mr. Villarreal’s objection to the use of the burglary conviction as an ACCA predicate because of the expansive definition of “owner;” however, the district court reduced the sentence for time spent in state custody for another state offense taken into account as relevant conduct and ordered the federal sentence of 165 months and 26 days to run concurrently with that state sentence.

Mr. Villarreal appealed his conviction and sentence, arguing that his burglary conviction was not “generic” burglary due to the Texas definition of “owner” incorporated into that statute, among other arguments. The Fifth Circuit affirmed his conviction and sentence in *United States v. Villarreal*, 519 Fed. Appx. 236 (5th Cir. 2013) (unpublished). This Court denied his petition for a writ of certiorari on October 7, 2013. *Villarreal v. United States*, 571 U.S. 906 (2013).

B. Current proceedings

On June 6, 2016, Mr. Villarreal filed his first motion to vacate his sentence under 28 U.S.C. § 2255, asserting that the ACCA classification was in error because none of his prior offenses qualified as a “violent felony” in light of *Johnson v. United States*, 576 U.S. 591, 597 (2015), which declared the “residual clause” of 18 U.S.C. § 924(e)(2)(B)(ii) (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”) to be unconstitutionally vague.

There were a series of filings and an initial report and recommendation by the magistrate judge leading up to the ultimate decision by the district court to dismiss the case for failure to meet the one-year limitation of 28 U.S.C. § 2255(f) because, according to the district court, Mr. Villarreal’s arguments did not “rely” on the *Johnson* decision. In those filings, the government asserted that Mr. Villarreal’s aggravated assault convictions qualified as “violent felony” offenses under the ACCA without regard to *Johnson* under the remaining portions of the “violent felony” definition not affected by that decision, namely, that offenses under Texas’s aggravated assault statute qualified because that statute “has as an element the use, attempted use, or threatened use of physical force against the person of another,” under 18 U.S.C. § 924(e)(2)(B)(i). Mr. Villarreal argued that his aggravated assault convictions could not so qualify because, among other reasons, the Texas statute presented a list of aggravating factors that were not divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016).

After an initial report and recommendation by the magistrate judge recommending that the district court grant Mr. Villarreal’s petition on the basis of arguments concerning

his burglary conviction, arguments which he no longer pursues in light of *Quarles v. United States*, 139 S. Ct. 1872 (2019), the government first raised the limitations argument that the district court ultimately credited. The government objected that Mr. Villarreal's petition was untimely because his claim did not rely on *Johnson*, since at the time of his sentencing burglary was considered an enumerated offense and the district court so treated it, citing *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018) and *Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018) and, subsequently, *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). Mr. Villarreal countered that most circuit courts of appeal have ruled that timeliness is determined by the right asserted or invoked, and not by whether the claim can actually succeed on the merits of whether the residual clause rather than the enumerated offenses clause of the ACCA was the basis of the sentence. He cited, among other cases, *United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017), *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017) and *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018).

On July 25, 2019, the magistrate judge issued an amended report and recommendation, in which he recommended dismissal of the petition based on timeliness. The magistrate judge acknowledged that “[t]he Fifth Circuit has not affirmatively decided which of the two tests presented by Movant and Respondent applies to timeliness under § 2255(f)(3).” Those two tests were Mr. Villarreal’s argument that most circuits have adopted a timeliness test based on whether the claimant “asserts” or invokes a right created by a new Supreme Court decision versus the government’s argument that the tests of actual reliance set out in *Wiese* and *Clay* should be applied not just in determining successive petitions under 28 U.S.C. § 2255(h), but also in determining timeliness under § 2255(f)(3).

Surveying decisions from other circuit courts of appeals, the magistrate judge concluded that “a majority of other Circuits have adopted standards that require a movant to show that, at the very least, he may have been sentenced according to the residual clause,” leading the magistrate judge to “believe[] this to be the most appropriate standard in the absence of any Fifth Circuit precedent.” The magistrate judge invoked *Wiese* for the proposition that a court must look to the law at the time of the original sentence to determine whether the sentence was imposed under the residual clause or the enumerated offenses clause.

Putting those two propositions together, the magistrate judge determined that Mr. Villarreal’s petition was untimely. With regard to the aggravated assault convictions, looking to Fifth Circuit case law at the time of the original sentencing only and ignoring *Mathis*, the magistrate judge opined that the indicted charge involving use of a deadly weapon as the aggravating circumstance did have the use of force as an element, so that any claim with regard to those convictions likewise would be untimely because not based in the residual clause.

On August 7, 2019, Mr. Villarreal filed objections to the amended report and recommendation. Among those objections, Mr. Villarreal also argued that *Mathis* does have a role to play in determining the merits of the case, and that the magistrate judge erred to the extent his report could be interpreted to apply only a historical analysis on the merits of Mr. Villarreal’s claim. On September 25, 2019, the district court adopted the Magistrate Judge’s amended report and recommendation, dismissed the petition as untimely, and denied a certificate of appealability.

Mr. Villarreal filed notice of appeal to the Fifth Circuit and applied for a certificate of appealability. With respect to the procedural issues, he argued that reasonable jurists could debate whether Mr. Villarreal’s petition was timely under 28 U.S.C. § 2253(f)(3) because there were at least two different, competing lines of precedent arising in various circuit courts of appeals on the issue of the required showing of reliance on a newly-recognized right in one of this Court’s opinions. On the substantive issues raised in the petition, he argued that reasonable jurists can debate whether the petition states a valid claim of denial of a constitutional right under *Johnson* because there were at least two competing lines of precedent from other courts of appeals on whether currently-applicable case law such as *Mathis* must be applied to determine the merits of a constitutional claim.

By order dated December 29, 2020, a judge of the Fifth Circuit denied a certificate of appealability. The order did not address the underlying procedural issues concerning reliance on this Court’s precedent, but instead focused on the merits of the issues, finding that Mr. Villarreal had not shown that reasonable jurists could debate whether his petition set forth a valid claim of denial of a constitutional right.

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

The district court had jurisdiction pursuant to 28 U.S.C. § 2255.

REASONS FOR GRANTING THE PETITION

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

This Court will decide whether recklessly causing serious injury is a “use of physical force against” the victim, for purposes of the ACCA, in *Borden*. The Tennessee aggravated assault statute in that case is remarkably similar to the Texas aggravated assault statute at issue here. The Court should hold this petition pending a decision in *Borden*. If the petitioner in *Borden* prevails, the Court should vacate the Fifth Circuit’s denial of COA and remand.

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

In Texas, a person commits simple assault in one of three ways: (1) “intentionally, knowingly, or recklessly caus[ing] serious bodily injury to another”; (2) intentionally or knowingly threaten[ing] another with imminent bodily injury”; or (3) “intentionally or knowingly caus[ing] physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.” Tex. Penal Code § 22.01(a). Texas defines aggravated assault as committing a simple assault as defined in Tex. Penal Code § 22.01 with either one of the following aggravating factors: (1) “caus[ing] serious bodily injury to another” or (2) “us[ing] or exhibit[ing] a deadly weapon during the commission of the assault.” Tex. Penal Code § 22.02(a).

Although the three types of Texas simple assault are divisible because they are elements comprising separate crimes, the culpable mental states in the Texas simple assault statute, as well as the aggravating factors in the Texas aggravated assault statute, are

alternative means and therefore indivisible. *See, e.g., United States v. Howell*, 838 F.3d 489, 498-99 (5th Cir. 2016); *Landrian v. State*, 268 S.W.3d 532, 537-39 (Tex. Crim. App. 2008). As a result, a person’s conviction cannot be narrowed under the modified categorical approach except to the type of simple assault with the minimum mental state under the statute (*e.g.*, reckless bodily injury assault) with an aggravating factor.

Because of how Texas has chosen to define these offenses, Texas aggravated assault reaches some unexpected conduct, including drunk or reckless driving that results in serious bodily injury. In Texas, a “deadly weapon” includes a vehicle driven by a drunk person. *See Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (holding that, where the defendant was too drunk to control the vehicle and accidentally killed a man, the vehicle was “a deadly weapon” because “a thing which actually causes death is, by definition, ‘capable of causing death’”). So too is a recklessly driven automobile, even if the driver did not intend to use the car as a weapon. *Walker v. State*, 897 S.W. 2d 812, 814 (Tex. Crim. App. 1995); *see also Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156, *4-*5 (Tex. App.—Dallas Nov. 27, 2013, no pet.) (unpublished); *McNair v. State*, No. 02-10-00257-CR, 2011 WL 5995302, at *9 (Tex. App.—Fort Worth Nov. 23, 2011, no pet.) (unpublished). With this broad definition of “deadly weapon,” Texas aggravated assault extends to when a drunk driver causes serious bodily injury. *See Stanley v. State*, 470 S.W.3d 664, 667 (Tex. App.—Dallas, no pet.) (aggravated assault indictment based on drunk driving). An aggravated assault conviction can also be secured based on a person’s reckless driving—including by speeding—that causes serious bodily injury. *See Venegas v. State*, 560 S.W.3d 337, 351 (Tex. App.—San Antonio 2018, no pet.) (To obtain an

aggravated assault conviction, “the State was required to prove beyond a reasonable doubt that Venegas intentionally, knowingly, or recklessly caused serious bodily injury to Ramos by failing to maintain a reasonable speed or driving in a manner that disregarded the safety of other motorists on the roadway.”).

The inclusion within the ambit of Texas’s aggravated assault statute of reckless driving conduct places the Fifth Circuit squarely in the debate among the circuits over the proper scope of the force-as-an-element clause of the ACCA’s definition of “violent felony” and similar definitions of crimes of violence. The Eighth Circuit has held that an offense that can be committed by reckless driving does not have the requisite force element. In *United States v. Fields*, 863 F.3d 1012, 1013 (8th Cir. 2017), the Eighth Circuit evaluated whether a prior conviction for Missouri second-degree assault was categorically a “crime of violence” for purposes of applying a sentencing enhancement under the United States Sentencing Guidelines. The Missouri statute defined the offense at issue as “recklessly caus[ing] serious physical injury to another person.” *Fields*, 863 F.3d at 1014 (brackets in original omitted). The Eighth Circuit held that, because the Missouri statute encompassed reckless driving resulting in injury, it did not qualify as a “crime of violence.” *Id.* Other circuit courts of appeals have similarly held that offenses that can be committed with a reckless *mens rea* do not qualify as “violent felony” offenses for purposes of 18 U.S.C. § 924(e). See *United States v. Windley*, 864 F.3d 36, 38-39 (1st Cir. 2017); *United States v. Rose*, 896 F.3d 104, 114 (1st Cir. 2018); see also *United States v. Middleton*, 883 F.3d 485, 487, 489-93 & 497 (concurring opinion) (4th Cir. 2018). The Fifth Circuit, however, has taken the opposite approach, holding that a *mens rea* of recklessness in the context of

aggravated assault statutes is sufficient to fall within the ACCA definition of “violent felony.” *See United States v. Griffin*, 946 F.3d 759, 762 (5th Cir. 2020).

B. A decision in favor of Borden in *Borden v. United States*, No. 19-5410, should overturn the COA denial.

Mr. Villarreal requests that the Court hold his petition until it decides *Borden v. United States*, No. 19-5410, and then dispose of the petition as appropriate. In *Borden*, the Court has granted the petition of certiorari as to Question 1, which is whether the “use of force” clause in the Armed Career Criminal Act (the “ACCA”), 18 U.S.C. § 924(e)(2)(B)(i) encompass crimes with a *mens rea* of mere recklessness.” *See Borden*, 140 S. Ct. 1262 (2020). The question presented in this case is the same, as applied to Texas’s aggravated assault statute.

In the district court and the in the Fifth Circuit, Mr. Villarreal was entitled to a COA on this issue if he could 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 an individual circuit. The question is whether reasonable jurists could debate the outcome in general.

If the petitioner in *Borden* prevails in this Court, then that will show that the merits of Mr. Villarreal’s motion were, and still are, debatable. As set forth below, the procedural issues on which the district court based its order of dismissal equally present questions that are in fact debated among the circuit court of appeals. In those circumstances, this Court should then vacate the order denying a certificate of appealability and remand this case to the Fifth Circuit for further proceedings.

II IF TEXAS’S AGGRAVATED ASSAULT IS NOT CATEGORICALLY A VIOLENT FELONY, THEN THE PROCEDURAL MERITS OF MR. VILLARREAL’S PETITION ARE DEBATABLE

The procedural issues remaining in this case are also debatable. The district court, in adopting the magistrate judge’s amended report and recommendation, ultimately dismissed Mr. Villarreal’s petition because the district court found that he could not meet the one-year limitations requirement of 28 U.S.C. § 2255(f)(3). That holding encompassed two separate procedural issues.

The first issue is whether the timeliness rules of Section 2255(f)(3) require a showing of actual reliance at all. Mr. Villarreal had argued that timeliness is met if the defendant “asserts” or “invokes” the right established by recent Supreme Court precedent, in this case *Johnson*, and he relied on the decisions of other circuit courts of appeals that have so held. *See United States. Snyder*, 871 F.3d 1122, 1125-26 (10th Cir. 2017); *Beeman v. United States*, 871 F.3d 1215, 1220-21 (11th Cir. 2017); *Cross v. United States*, 892 F.3d 288, 293-94 (7th Cir. 2018). The government had argued that to validly assert a *Johnson* claim, a defendant must show that it is more likely than not that the sentencing court relied on the ACCA’s residual clause in classifying his prior conviction as a violent felony, citing

to Fifth Circuit precedent under 28 U.S.C. § 2255(h) concerning successive petitions to support this argument. *See United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018); *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019).

That issue remains a question for debate even within circuit courts of appeals. The First Circuit appeared to adopt the rule that timeliness in the context of a *Johnson* claim requires an actual reliance on the residual clause at the initial sentencing. *See Dimott v. United States*, 881 F.3d 232 (1st Cir. 2018) (holding that claims asserted under *Johnson* were untimely because the sentence was imposed based on the enumerated offenses clause of 18 U.S.C. § 924(e)). However, most recently, the First Circuit recognized that there remains an ongoing controversy among the circuits as to whether the timeliness requirement must be judged by reference to whether the claim is actually grounded in the residual clause based on the claims merits or whether an assertion or invocation of the newly-recognized right under *Johnson* is sufficient. *See Shea v. United States*, 976 F.3d 63, 70 (1st Cir. 2020). Within the Fifth Circuit itself, members of the circuit court have recognized this ongoing debate about the proper application of Section 2253(f)(3). *See United States v. London*, 937 F.3d 502, 511 (5th Cir. 2019), *cert. denied* 140 S. Ct. 1140 (2020) (Costa, J., concurring) (arguing that the Fifth Circuit’s approach has “has improperly read a success requirement into a statute that requires only the assertion of the right.”) Counsel for Mr. Villarreal has located no decision of this Court resolving that disputed issue.

The second procedural issue is whether decisions of this Court issued after Mr. Villarreal’s sentencing, such as *Mathis*, may be applied to determine whether his

constitutional claim relies on the newly recognized right, or whether the courts may look only to the historical state of the law as it existed at the time of sentencing. In Mr. Villarreal’s case, the issue is whether this Court’s opinion in *Mathis* may be applied to determine whether Mr. Villarreal’s aggravated assault convictions are properly treated as “violent felonies,” or whether, as the magistrate judge recommended and the district court adopted as its order of dismissal, that only the law at the time of the original sentencing may be applied. Mr. Villarreal has relied on the holding of the Third Circuit in *United States v. Peppers*, 899 F.3d 211, 227-30 (3d Cir. 2018): “We thus hold that, once a defendant has satisfied § 2255(h)’s gatekeeping requirements by relying on *Johnson*, he may use post-sentencing cases such as *Mathis*, . . . to support his *Johnson* claim because they are Supreme Court cases that ensure we correctly apply the ACCA’s provisions.” However, other circuit courts of appeals have ruled that, on the merits, the petitioner must prove the district court relied on the residual clause as a historical matter of the record and the law at the time of sentencing. *See Beeman*, 871 F.3d at 1224 n.9; *Snyder*, 871 F.3d at 1128-30 (“Thus, the relevant legal background is, so to speak, a ‘snapshot’ of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions.”); *see also Golinveaux v. United States*, 915 F.3d 564, 567-69 (8th Cir. 2019) (looking to historical record of sentencing and legal environment at that time only).

This issue of whether *Mathis* is properly applied to determine either the merits of a petition asserting a *Johnson* claim or its timeliness is still debatable. The Fourth Circuit recently clarified that *Mathis* does apply to determine whether prior offenses are properly

treated as a divisible, even though at the time of the original sentencing a different approach would have applied pre-*Mathis*. *See United States v. Al-Muwwakkil*, 983 F.3d 748, 753-54, 757, 761 (4th Cir. 2020). On the other hand, the government continued to argue in *Waagner v. United States*, 971 F.3d 647 (7th Cir. 2020), *cert. denied* __ S. Ct. __, 2021 WL 161103 (Jan. 19, 2021), that *Mathis* could not be applied to determine whether the petitioner’s Section 2255 petition asserted a *Johnson* claim for purposes of Section 2255(f)’s timeliness rules, and the Seventh Circuit treated that as an open issue that it did not need to resolve in that case. *See id.* 971 F.3d at 653-55.

Therefore, with regard to both procedural issues underlying the district court’s dismissal of Mr. Villarreal’s petition as untimely, jurists do in fact continue to debate the applicable rules at issue. The Fifth Circuit should have granted a COA on these issues.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold this petition pending its final decision in *Borden v. United States*, 140 S. Ct. 1262 (2020), and then dispose of the petition as appropriate.

Date: April 12, 2020

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By



MICHAEL HERMAN
First Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600