No. _____

In the

Supreme Court of the United States

GARY LEE WILLINGHAM,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After obtaining the prefiling authorization required by 28 U.S.C. § 2255(h)(2), Mr. Willingham moved to vacate his ACCA-enhanced sentence. The Government moved to dismiss the case for lack of jurisdiction, but Mr. Willingham successfully opposed dismissal arguing that the court could and should reach the merits. Years later, after the case was assigned to a different district judge, the court reversed itself and held that it lacked jurisdiction to adjudicate the merits.

Did Mr. Willingham waive his argument that the district court had jurisdiction to adjudicate the merits of his motion?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

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

United States v. Willingham, No. 1:01-CR-64 (N.D. Tex.)

United States v. Willingham, No. No. 02-10265 (5th Cir.)

Willingham v. United States, No. 02-8675 (U.S.) *Willingham v. United States*, No. 1:03-CV-86 (N.D. Tex.)

In re Willingham, No. 15-10794 (5th Cir.)

In re Willingham, No. 16-10859 (5th Cir.)

Willingham v. United States, No. 1:16-CV-116 (N.D. Tex.)

United States v. Willingham, No. 19-11392 (5th Cir.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Lee Willingham asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's order denying a Certificate of Appealability is reprinted on pages 1a–3a of the Appendix. The Fifth Circuit's order granting authorization for a successive § 2255(h) motion is reprinted at pages 4a–6a of the Appendix. The district court's original opinion explaining why it did have jurisdiction to consider the merits of the authorized motion is reprinted at pages at pages 7a–22a of the Appendix. The district court's subsequent order lifting its stay of the case and dismissing it appears on pages 23a–24a of the Appendix. None of these opinions was selected for publication in a federal reporter.

JURISDICTION

This Court has jurisdiction to review denials of Certificate of Appealability under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 253 (1998). The Fifth Circuit denied Mr. Willingham's motion for COA on December 21, 2020. On March 19, 2020, this Court extended the deadline to file certiorari to 150 days from the date of that order.

STATUTORY PROVISIONS INVOLVED

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

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

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

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

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

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

28 U.S.C. § 2255(h) provides:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

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

28 U.S.C. § 2244 provides:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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

> (e)
>
> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
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> (2) As used in this subsection—
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> (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
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> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives [. . .]; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

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

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

STATEMENT

1. Petitioner Gary Lee Willingham pawned a shotgun in March of 2001. His possession of the gun was forbidden by 18 U.S.C. § 922(g)(1) because he had prior felony convictions, including several Texas burglaries. After Mr. Willingham entered a conditional guilty plea, the district court imposed an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). The factual resume recited three prior Texas convictions for burglary of a habitation. Pet. App. 8a. The Government conceded below that each of those convictions arose under Texas Penal Code § 30.02(a)(3), which (Petitioner contends, and the Fifth Circuit until recently recognized) is not a generic burglary for purposes of the ACCA's enumerated offense clause. Pet. App. 21a. The PSR revealed several more burglary convictions. Pet. App. 15a.

2. Applying the ACCA, the district court sentenced Mr. Willingham to 210 months in prison, followed by five years of supervised release. Pet. App. 1a. Without the ACCA, the maximum possible sentence would have been 120 months in prison and three years of supervised release. *See* 18 U.S.C. §§ 924(a)(2) & 3583(e). Mr. Willingham has completed the prison sentence but he remains subject to the ACCA-enhanced penalty of supervised release.

3. The Fifth Circuit affirmed the conviction on direct appeal. *United States v. Willingham*, 310 F.3d 367 (5th Cir. 2002). This Court denied certiorari. 537 U.S. 1239 (2003). The district court denied Mr. Willingham's first motion under 28 U.S.C. § 2255 in 2004. Pet. App. 9a.

4. After this Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), Mr. Willingham successfully moved for authorization to file a second motion to vacate under 28 U.S.C. § 2255(h). Pet. App. 4a–6a. The Fifth Circuit explicitly authorized a motion that would argue "that [Mr. Willingham's] sentence was unconstitutionally enhanced under the Armed Career Criminal Act (ACCA) because his prior Texas burglary convictions were violent felonies only under the residual clause of the ACCA, which has been invalidated." Pet. App. 4a.

5. After Mr. Willingham filed his authorized motion in district court, the Government moved to dismiss the case for lack of jurisdiction. Pet. App. 7a. The Government argued that the district court would have no jurisdiction over the case unless Mr. Willingham could "prove[ ] that he was sentenced under the residual clause," i.e., if he could prove that the sentencing court was subjectively thinking

about the residual clause rather than the generic, enumerated offense of "burglary." 18 U.S.C. § 924(e)(2)(B)(ii).

6. Mr. Willingham filed a response opposing the Government's motion. As relevant here, he explicitly argued that he was not required to prove that the district court subjectively relied on the residual clause; that his claim both contained and relied on the new rule in *Johnson* because, absent that rule, his sentence would have been authorized by the residual clause. Pet. App. 25a–36a. He also pointed to decisions throughout the nation recognizing that *Johnson* upended any ACCA sentence predicated upon a non-generic burglary.

7. The district court initially agreed with Mr. Willingham: "If Willingham had challenged the classification of his burglary offenses at any time prior to *Johnson*, that challenge would have been futile. The Government would have pointed to the residual clause, and, under then-existing precedent, would have prevailed." Pet. App. 19a. In other words, Mr. Willingham's motion both contained and relied on the new constitutional rule in *Johnson*.

8. After denying the Government's motion to dismiss in June of 2017, the district court stayed the case for more than two years. Mr. Willingham objected to the lengthy stay, but his objections were overruled. During that time, the case was assigned to a different District Judge. The Fifth Circuit also issued several decisions adverse to Mr. Willingham; foremost among them 550 (5th Cir. 2019). *Clay* acknowledged a circuit split over the gatekeeping burden a defendant must satisfy to secure a merits ruling under § 2255(h) and chose the strictest option: a defendant

must prove, by a preponderance of the evidence, that the district court relied on the residual clause when imposing the sentence.

9. In October of 2019, the district court vacated the stay and dismissed the authorized motion for "lack of jurisdiction" in a single order. Pet. App. 23a.

10. Mr. Willingham moved in the Fifth Circuit for a Certificate of Appealability. He pointed to disagreement expressed by federal judges within the Fifth Circuit and throughout the nation about whether Trespass-Plus-Crime burglaries (like Texas Penal Code § 30.02(a)(3)) were "generic," and about what gatekeeping burden a § 2255 movant must satisfy before securing a ruling on the merits.

11. Without inviting any response from the Government, the Fifth Circuit denied a COA. The court erroneously asserted that Mr. Willingham had never raised his jurisdictional arguments in district court:

> Willingham contends that it is debatable whether he, as a federal prisoner, was required to satisfy the standards set forth in 28 U.S.C. § 2244(b)(2)(A) and (b)(4), in order for the district court to have jurisdiction to entertain the merits of his authorized successive § 2255 motion. He avers that the district court should have considered the merits of his claims and that he should not have been required to show that his claims relied on the holding in *Johnson* or that it was more likely than not that the sentencing court relied on the residual clause.
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> * * * *
>
> *All of Willingham's claims are raised for the first time in his COA pleadings*. As such, we decline to consider them.

Pet. App. 2a (emphasis added). This timely petition follows.

REASONS TO GRANT THE PETITION

The Fifth Circuit's plainly erroneous "waiver" ruling warrants an exercise of this Court's supervisory power.

A. Mr. Willingham preserved his argument that his § 2255(h) motion satisfied the threshold requirements and that the court had jurisdiction to review the merits. He even prevailed on those arguments in district court.

In his response to the Government's motion to dismiss for lack of jurisdiction, Mr. Willingham vigorously argued that the district court *did* have jurisdiction to consider the case; that *Johnson* authorized post-conviction relief for defendants whose ACCA sentences were predicated upon non-generic burglaries; and that he satisfied all "the criteria specified in 28 U.S.C. § 2244" because "his claim 'relies on' the rule in *Johnson*, a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Pet. App. 28a. He also argued that it was sufficient to show that the sentencing court *might have* relied on the residual clause at the time of sentencing. Pet. App. 28a–35a.

The district court agreed, at least initially. The court issued a detailed opinion explaining why Mr. Willingham could not challenge the legality of his sentence prior to *Johnson*. Pet. App. 7a–22a. The Court also concluded that it had jurisdiction to rule on the merits. Pet. App. 13a. The court then stayed the case at the Government's urging while the Fifth Circuit decided several cases that are relevant to the merits.

But while the case was stayed, the case was assigned to a different district judge. Relying on intervening Fifth Circuit authority, the Court vacated the stay and held that it *lacked* jurisdiction to adjudicate the merits. Pet. App. 23a–24a.

B. The Fifth Circuit's denial of COA was based upon a misreading of the record.

It simply isn't true that Mr. Willingham waited until the COA stage to argue about jurisdiction. He successfully opposed the Government's motion to dismiss the case back in 2017 precisely by arguing that his motion satisfied all that was required of a second-time § 2255 movant. Any *additional* argument on that point was precluded by an order staying the case; that stay was extended several times.

C. Absent this blatant misreading of the record, the Fifth Circuit would have been duty-bound to issue a COA.

Mr. Willingham's Brief in Support of COA at the Fifth Circuit documented actual disagreement among federal judges about whether Texas burglary was "generic" burglary and about whether a movant must prove, as a jurisdictional matter, that the sentencing court "relied on" the ACCA's residual clause. Because these questions are debatable, the Fifth Circuit was required to issue a COA. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

D. This Court has not hesitated to use summary reversal where a Circuit Court has plainly erred in adjudicating a post-conviction case.

In 1981, Justice Marshall described summary reversal as "a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Some recent commenters suggest that "summary reversal has become a regular part of the Supreme Court's practice." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 1–2 (2015).

This case involves a plain misapplication of the COA standard based upon an indisputable misreading of the record. It is hard to imagine what *more* Mr. Willingham could have done to preserve his argument that he need not prove the district court subjectively relied on the ACCA's residual clause. It is at least debatable that his response arguing *exactly that point*, and *successfully so*, was sufficient to preserve the argument for appellate review. This is particularly true where the case was then stayed until, years later, the district court changed its mind.

CONCLUSION

The Court should grant the petition and summarily reverse the decision below.

Respectfully submitted,

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MAY 20, 2021