No. _____

In the

Supreme Court of the United States

_____

Adrian Castro,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Where the Court of Appeals itself grants a Certificate of Appealability and specifies the issue to be decided, the parties fully brief the merits, and the Government never objects to the adequacy of the COA, may the Court *sua sponte* raise an alleged inadequacy of its own COA?

PARTIES TO THE PROCEEDING

Petitioner is Adrian Castro who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adrian Castro seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is available at *United States v. Adrian Castro*, 30 F.4th 240 (5th Cir. 2022). It is reprinted in Appendix A to this Petition. The district court's judgement is attached as Appendix B.

JURISDICTION

The panel opinion of the Fifth Circuit was entered on March 17, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

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

§ 2253(c)

(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 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).

This case involves 18 U.S.C. § 924(c)(3):

> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

This case also involves 18 U.S.C. § 2114(a):

> (a) Assault.—
> A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

LIST OF PROCEEDINGS BELOW

1. *United States v. Adrian Castro*, 3:16-CV-1761, United States District Court for the Northern District of Texas. Judgment entered on November 30, 2017 (Appendix B).

2. *United States v. Adrian Castro*, 30 F.4th 240 (2022), Court of Appeals for the Fifth Circuit. COA vacated and appeal dismissed on March 17, 2022. (Appendix A).

STATEMENT OF THE CASE

In 2004, Adrian Castro pleaded guilty to four counts of postal robbery under 18 U.S.C. § 2114 and two counts of using, carrying, or brandishing a firearm in furtherance of a crime of violence under 18 U.S.C. §924(c). (ROA.131–133). The specific federal offense deemed a "crime of violence" was 18 U.S.C. § 2114, which penalizes robbing or assaulting (with intent to rob) a person with custody of mail, money, or property belonging to the United States. The district court sentenced Mr. Castro to 552 months—46 years—in the custody of the Bureau of Prisons. (ROA.133). Thirty-seven of those years were attributable to the § 924(c) convictions. He did not file a direct appeal.

Years later, this Court announced and applied a new constitutional rule, holding that it would violate due process to condition significant sentencing consequences upon the application of an uncertain risk standard to the judicially imagined ordinary case of a crime. *See Johnson v. United States*, 576 U.S. 591, 597–598 (2015). On June 24, 2016, the district court appointed the Federal Public Defender's Office "for the purpose of investigating the defendant's claims for relief from his criminal sentence, and representing him in pursuit of any potentially meritorious claims." (ROA.150).

On that same day, Mr. Castro filed his first motion to vacate pursuant to 28 U.S.C. § 2255. (ROA.4–13). That motion argued that the convictions and sentences under § 924(c) (Counts Two and Ten) could not survive constitutional scrutiny because the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

The motion relied on the new constitutional rule announced in *Johnson*. (ROA.10). He argued that § 924(c) convictions could no longer be predicated upon 18 U.S.C. § 2114. (ROA.10).

The Government argued that Mr. Castro's motion was untimely. (ROA.40–46). Mr. Castro responded that the motion was timely under 28 U.S.C. § 2255(f)(3). (ROA.60). Under that provision, the statute of limitations expires one year after

> 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;

28 U.S.C. § 2255(f)(3). The Government contended—and the district court ultimately agreed—that the "right" recognized in *Johnson* had no effect on § 924(c)(3)(B). (ROA.63–65).

The district court denied the motion, holding (erroneously) that § 924(c)'s residual clause was not unconstitutionally vague. (ROA.55–56, *adopted*, ROA.63–65). The court refused to stay the action, dismissing the case with prejudice. The district court denied a COA.

Mr. Castro then moved for a COA in the Fifth Circuit Court of Appeals on the following issues:

> 1. Is the residual clause found in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague?
>
> 2. Mr. Castro's first motion to vacate was filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and prior to *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Was Mr. Castro's motion timely?
>
> 3. Given the existence of a circuit split and a pending case before the U.S. Supreme Court, was it inappropriate to dismiss Mr. Castro's motion *with prejudice?*

Mr. Castro filed his Motion seeking a COA on May 10, 2018. On September 7, 2018—while that motion was pending—the court resolved the constitutional question in Mr. Castro's favor. *See United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *aff'd in part,* 139 S. Ct. 2319 (2019).

A Fifth Circuit judge later granted a COA only on the second question—whether Mr. Castro's motion was timely. After acknowledging the constitutional nature of Mr. Castro's claim—he "based his challenge on *Johnson*"—and expressing an understanding that a movant is entitled to COA on a procedural question only if he shows that the procedural question and the constitutional question are debatable—Judge Duncan decided to "indicate" only the procedural question that remained debatable: "a COA is GRANTED as to whether the district court erred by denying Castro's § 2255 motion as untimely." (Order Granting COA, Jan. 14, 2019).

After a stay (to await the outcome of *Davis*), both sides fully briefed the merits of the timeliness question. The case was calendared for oral argument on March 31, 2021. But on March 12th, the Panel assigned to hear the case directed the parties to file supplemental briefs addressing a deficiency in the COA that the court itself had crafted. The court then removed the case from the calendar, vacated the COA as invalid, and dismissed the appeal on July 14, 2021. [Appendix A].

REASON TO GRANT THIS PETITION

This Court should grant the Petition because the Fifth Circuit's published decision conflicts with this Court's reasoning in *Gonzalez v. Thaler*.

The Fifth Circuit's rule—that it may *sua sponte* vacate a Certificate of Appealability it wrote after the parties have fully briefed the merits—conflicts with this Court's reasoning in *Gonzalez v. Thaler*, 565 U.S. 134 (2012). In *Gonzalez*, this Court made clear that "[o]nce a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument . . . the COA has fulfilled that gatekeeping function." *Id.* at 145. By omitting the constitutional question raised in the application for a COA, and later vacating the COA and dismissing the appeal after full briefing and preparation for oral argument, the Fifth Circuit has created a scheme that "exemplifies those inefficiencies" identified by *Gonzalez*. *See id.*

Gonzalez involved a strikingly similar fact pattern—there, although Gonzalez asked for a COA on both constitutional and procedural grounds, a Fifth Circuit judge granted only on the procedural question but did not "indicate" the issue "on which Gonzalez had made a substantial showing of the denial of a constitutional right, as required by [28 U.S.C.] § 2253(c)(3)." *Id.* at 141. The State did not raise any concerns about the COA until it filed opposition to Gonzalez's petition for a writ of certiorari. *Id.* at 139. This Court ruled that because § 2253(c)(3) is nonjurisdictional, it is a waivable requirement and not one that "courts are obligated to consider *sua sponte*." *Id.* at 141.

Besides the plain language of the statute, this Court laid out two rationales for holding § 2253(c)(3) is not jurisdictional and does not warrant *sua sponte* dismissals after a judge has granted a COA. First, the Court specifically emphasized that "Congress placed the power to issue COAs in the hands of a 'circuit justice or judge.'" *Id.* at 143. Thus, even though Gonzalez advanced both a procedural and constitutional issue in his application for a COA, he had "no control over how the judge drafts the COA and . . . may have done everything required of him by law. That fact would only compound the 'unfai[r] prejudice' resulting from the *sua sponte* dismissals and remands that jurisdictional treatment would entail." *Id.* at 144 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011)).

Second, such treatment would "thwart Congress' intent" to eliminate delays in federal habeas review. *Id.* The purpose of the COA process is to screen out meritless claims before a case is assigned to a merits panel. But once a judge has made the decision to grant a COA and the parties expend resources in briefing and argument, the COA has fulfilled its gatekeeping function. "Even if additional screening of already-issued COAs for § 2253(c)(3) defects could further winnow the cases before the courts of appeals, that would not outweigh the costs of further delay from the extra layer of review." *Id.* at 145.

Here, even though the primary constitutional question (whether § 924(c)'s residual clause is unconstitutionally vague) had loomed large over this case from the beginning, and even though the district court's timeliness decision was explicitly predicated upon the entirely wrong view that § 924(c)(3)(B) was not vague, the COA

does not explicitly "indicate" that constitutional question. That error cannot be placed on Petitioner. The application for a COA requested both a constitutional question and a related procedural issue. Judge Duncan made a determination that Mr. Castro's case satisfied the COA standard. Resources were deployed in briefing and in preparing for oral argument. The COA fulfilled its congressionally mandated gatekeeping function.

Between January 2019 and March 2021, the Government never once complained about the adequacy of the COA. Both sides extensively briefed the timeliness question. At the time the circuit court chose to challenge its own COA, briefing was complete, and the case was set for oral argument. The Government *could have* raised a timely complaint about the adequacy of the COA, but it didn't. The Government did not invoke the claims-processing rules of § 2253(c)(2) or (3), nor did it ask the Fifth Circuit to dismiss the case until the court itself prompted it to address the deficiency. The Government clearly waived any objection. *See Moreland v. Eplett*, 18 F.4th 261, 267 (7th Cir. 2021) (holding the State challenged the COA to late when the case had already been briefed the parties had presented oral argument); *Rayner v. Mills*, 685 F.3d 631, 635 (6th Cir. 2012) (refusing to consider the State's challenge to the COA after the case was briefed); *Williams v. United States*, 927 F.3d 427, 437–38 (6th Cir. 2019) (relying on *Gonzalez* to hold that "because any shortcomings in Williams's satisfaction of the § 2255(h) threshold conditions were not jurisdictional, invocation of any such defect was susceptible to forfeiture").

By *sua sponte* raising the issue and vacating the COA, the Fifth Circuit has created a rule incompatible with purpose of the COA process. *See Sistrunk v. Rozum*, 674 F.3d 181, 186 (3d Cir. 2012) ("'Once a judge has made the determination that a COA is warranted'—which has happened here—"the COA has fulfilled [its] gatekeeping function.' No further scrutiny of the COA is necessary.") (citing *Gonzalez*, 565 U.S. at 145). This Court should review that decision.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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