

No. _____

In the Supreme Court of the United States

MICHAEL DEWAYNE VICKERS,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent,

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Michael Dewayne Vickers asks leave to file the accompanying Application to Extend the Deadline to File a Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Vickers was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on June 2, 2022.

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APPLICATION FOR EXTENSION
OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To: The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit.

Applicant Michael Dewayne Vickers respectfully requests that the Court extend the deadline to file a Petition for a Writ of Certiorari in this case to July 13, 2022. *See* 28 U.S.C. § 2101(c); S. Ct. R. 13.5.

Basis for Jurisdiction

This Court will have jurisdiction to review the Fifth Circuit's judgment under 28 U.S.C. § 1254(1). The Fifth Circuit issued its judgment on March 14, 2022. *See* Appendix 1a. The court stayed its mandate pending a petition for a writ of certiorari on March 30, 2022.

Absent extension, Mr. Vickers's petition for certiorari would be due May 13, 2022.

Judgment to be Reviewed and Opinions Below

The Fifth Circuit's most recent opinion was not selected for publication. It is reprinted on pages 2a–3a of the Appendix. The Fifth Circuit's previous decision in the

case was published at 967 F.3d 480. This Court vacated that previous decision. *See Vickers v. United States*, 141 S. Ct. 2783 (2021).

Reasons for Granting an Extension

Mr. Vickers's attorney does not have time to complete an adequate petition for certiorari due to a heavy press of other work. His petition will present a substantial question that has divided the lower courts. He needs additional time.

1. The district court granted Mr. Vickers's authorized motion to vacate his sentence under 28 U.S.C. § 2255(h)(2) and *Johnson v. United States*, 576 U.S. 591 (2015), but the Government appealed. The Fifth Circuit vacated the order granting § 2255 relief. *See United States v. Vickers*, 967 F.3d 480 (5th Cir. 2020). As noted above, this Court granted Mr. Vickers's petition for certiorari, vacated that decision, and remanded the case back to the Fifth Circuit for further consideration in light of *Borden v. United States*, 141 S. Ct. 2783 (2021).

2. On remand, after the parties had filed supplemental merits briefs addressing *Borden*, the Fifth Circuit asked the parties to file letter briefs “addressing whether [the Court of Appeals] has appellate jurisdiction.” App. 5a. The court specifically requested briefing on whether Mr. Vickers had satisfied the so-called “gatekeeping” requirements for successive § 2255(h) motions propounded in *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019); and *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018). Those decisions insist that, even after a Court of Appeals grants prefiling authorization to raise a *Johnson* claim under § 2255(h)(2), the movant must then prove in district court that it is more likely than not that the sentencing judge relied on the ACCA's residual clause, and that this is a jurisdictional requirement.

3. Mr. Vickers argued that he had satisfied any gatekeeping requirements of *Wiese* and *Clay*. But he also argued that any such requirement was a waivable, non-jurisdictional, claims-processing rule “that the Government long ago waived.” App. 10a & n.4 (citing *Williams v. United States*, 927 F.3d 427, 439 (6th Cir. 2019)). The Government informed the Fifth Circuit of its “nationwide position” “that 28 U.S.C. § 2244(b)(2)(A)’s gatekeeping provision is not jurisdictional,” but argued that the Fifth Circuit has “treated” the requirement as jurisdictional “in *Wiese* and *Clay*.”

4. The Court of Appeals remanded the case to the district court with instructions that it should “first determine whether there is jurisdiction to consider Vickers’s successive 28 U.S.C. § 2255 petition in light of our decisions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019).” App. 1a–2a.

5. Mr. Vickers’s petition for certiorari will raise two interrelated questions: (1) whether a movant who secures pre-filing authorization under 28 U.S.C. § 2255(h)(2) and *Johnson* must then prove, in district court, that it is more likely than not that the sentencing judge relied on the ACCA’s residual clause; and, (2) if so, whether that is a non-waivable, non-forfeitable jurisdictional requirement. Both questions are “substantial.” Both questions divide the circuits.

6. On the first question, the circuits are divided over whether a movant must prove that it is more likely than not that the sentencing judge relied on the residual clause, or if it is sufficient to prove that the sentencing judge may have relied on the clause. This split is entrenched and acknowledged, and it is ripe for resolution

by this Court. *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 so-called 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).

7. 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 that it is more likely than not that the sentencing court relied on the 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); and *Beeman v. United States*, 871 F.3d 1215, 1221–1222 (11th Cir. 2017).

8. On the second question, the Circuits are likewise divided—and the Government has repeatedly conceded that the Fifth Circuit is on the wrong side of the divide. This question is especially important here, where the Government was the Appellant and failed to argue about or even mention the gatekeeping standard until the case had already proceeded from Magistrate Judge to District Judge to Circuit Court. This was at least a forfeiture of the argument, and under Fifth Circuit precedent, it was also a waiver.

9. The Fifth Circuit started calling its gatekeeping rule “jurisdictional” without the benefit of adversarial briefing. The Sixth Circuit’s decision in *Williams v. United States*, 927 F.3d 427, 438 (6th Cir. 2019), explains why “§ 2244(b)(4) does not impose a jurisdictional bar on a federal prisoner . . . seeking relief under § 2255.” The Government has already expressed its “nationwide litigating position” that the gatekeeping rules imposed by § 2244(b)(4) are non-jurisdictional. U.S. C.A. Supp. Br. at 1 & n.1. (filed Feb. 23, 2022) It is only the “jurisdictional” classification of the rule that allowed the Government to raise the issue so late in the litigation: “Because this Court treats it as a jurisdictional issue, it can dismiss Vickers’s motion.” *Id.*

10. Granting the requested extension would allow Mr. Vickers’s attorney to fully brief these issues for this Court’s consideration.

11. Mr. Vickers’s attorney has been fully engaged on other pressing and difficult matters, and was unable to complete the petition. Those other matters include the petition for certiorari (filed March 21) in *Bell v. United States*, Supreme Court Case No. 21-7451; including a petition for certiorari in *Timothy Lindsey v. United States* on May 16; an evidentiary hearing in *Jimenez v. United States*, Northern District of Texas Case No. 2:19-CV-0221, which took place May 19–20, with a third day of evidence to follow; an amicus brief with the Board of Immigration Appeals filed on May 24; a petition for rehearing en banc in *United States v. Williams*, No. 20-11110, filed on May 25; an Initial Brief in a district-court appeal of a Magistrate Judge’s sentencing decision in *United States v. Corrales*, 5:22-cr-42 (N.D. Tex.), filed

June 1; and a Brief in Support of Certificate of Appealability in *United States v. Hays*, No. 21-11234, which is due on Friday, June 3, after several extensions.

12. Mr. Vickers's attorney will likely be out of the office and unable to work from June 6—June 15.

CONCLUSION

FOR THESE REASONS, Mr. Vickers asks this Court to extend the deadline to file a petition for certiorari to July 13, 2022. That would represent an extension of 30 days from the current deadline.

Respectfully submitted on June 2, 2022,

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