No. _____

In the

Supreme Court of the United States

TIMOTHY LINDSEY,
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

As required by 28 U.S.C. § 2255(h)(2), Mr. Lindsey secured prefiling authorization from the Fifth Circuit before filing a successive motion to vacate his ACCA-enhanced sentence under *Johnson v. United States*, 576 U.S. 591 (2015). Yet the district court and the Fifth Circuit concluded that the district court lacked subject-matter jurisdiction to adjudicate the authorized motion.

1. Did the district court have jurisdiction to consider Mr. Lindsey's authorized motion?

2. Considering two materially identical "burglary" statutes, the Fifth Circuit and the Seventh Circuit drew divergent conclusions about the theory constituted generic burglary. Could reasonable jurists debate the merits of Mr. Lindsey's § 2255(h)(2) motion?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

DIRECTLY RELATED PROCEEDINGS

United States v. Timothy Lindsey, No. 4:09-CR-135 (N.D. Tex. May 3, 2010)

Timothy Lindsey v. United States, No. 4:11-CV-250 (N.D. Tex. Oct. 11, 2011)

In re Timothy Lindsey, No. 15-10839 (5th Cir. Jan. 12, 2016)

In re Timothy Lindsey, No. 16-10728 (5th Cir. June 21, 2016)

Timothy Lindsey v. United States, No. 4:16-CV-514 (N.D. Tex. Jan. 2, 2020)

United States v. Timothy Lindsey, No. 20-10072 (5th Cir. Feb. 15, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Lindsey 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 was not selected for publication in the Federal Reporter. It is available at 2022 WL 458385 and is reprinted on pages 1a–5a of the Appendix. The Appendix also contains copies of the Fifth Circuit's orders granting a Certificate of Appealability (App. 7a–8a) and granting pre-filing authorization for a successive motion under 28 U.S.C. § 2255(h)(2) (App. 11a–12a). The district court's order dismissing that motion for lack of jurisdiction is reprinted at pages 9a–10a. None of these opinions was selected for publication in a federal reporter.

JURISDICTION

This Court has jurisdiction to review the Fifth Circuit's judgment under 28 U.S.C. § 1254(1). The Fifth Circuit issued its judgment on February 15, 2022.

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 28 U.S.C. § 2255(h), which 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).

(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 [. . .]; 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

The Fifth Circuit granted authorization for Petitioner to file a motion to vacate his sentence under 28 U.S.C. § 2255(h)(2), but the district court dismissed the case for lack of jurisdiction. The Fifth Circuit granted a Certificate of Appealability, but ultimately affirmed.

1. Petitioner Timothy Lindsey Timothy Lindsey pleaded guilty to possessing a firearm after felony conviction in 2009. Pet. App. 15a. The charge arose after Fort Worth police found Mr. Lindsey in possession of a firearm while arresting

him on suspicion of burglary. 5th Cir. Sealed R. 471–472.[1] Mr. Lindsey was not allowed to possess the gun because he had prior felony convictions (and because the gun was made outside of Texas). *See* 18 U.S.C. § 922(g)(1).

2. Normally, that charge carries a maximum sentence of ten years in prison and three years of supervised release. 18 U.S.C. § 924(a)(2); 18 U.S.C. § 3583(b). But the district court applied the Armed Career Criminal Act, 18 U.S.C. § 924(e), after concluding that Mr. Lindsey was previously convicted of four "violent felonies" and one "serious drug offense." 5th Cir. Sealed R. 475 ¶ 26. Each of the four "violent felonies" identified in Mr. Lindsey's Presentence Report was a conviction for the Texas offense of burglary of a habitation. 5th Cir. Sealed R. 480–471, 485. The PSR also recorded conviction four additional convictions for burglary of a building. 5th Cir. Sealed R. 482, 484.

3. The ACCA enhancement required a mandatory minimum sentence of 15 years in prison, and it opened the door to a longer term of supervised release. *See* 18 U.S.C. § 924(e)(1). On May 3, 2010, the district court sentenced Mr. Lindsey to the ACCA-mandated minimum term of 180 months in prison, followed by five years of supervised release. 5th Cir. R. 279–281. Mr. Lindsey did not appeal the judgment. According to the Bureau of Prisons, absent relief from this Court, Mr. Lindsey will remain in prison through November of 2026.

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[1] When citing the Presentence Investigation Report and other materials filed under seal, this petition uses the pagination from the Fifth Circuit's electronic record on appeal.

4. Mr. Lindsey filed an unsuccessful motion to vacate his conviction and sentence in 2011. That motion alleged that his trial counsel rendered ineffective assistance at the plea and sentencing stages. The district court denied that motion on the merits and denied a certificate of appealability. *Lindsey v. United States*, No. 4:11-cv-250 (N.D. Tex. Oct. 11, 2011).

5. After this Court struck down the ACCA's residual clause in *Johnson v. United States*, 576 U.S. 591 (2015), Mr. Lindsey twice sought permission to file a second motion to vacate his sentence to invoke *Johnson*'s new constitutional rule. The Fifth Circuit denied his first motion, erroneously concluding that *Johnson*'s new rule "does not apply retroactively to cases on collateral review." Pet. App. 14a (citing *In re Williams*, 806 F.3d 322 (5th Cir. 2015)).

6. The Fifth Circuit granted Mr. Lindsey's second motion for authorization. Pet. App. 11a–12a. By then, this Court had held that *Johnson*'s new rule was retroactive in *Welch v. United States*, 578 U.S. 120, 129–135 (2016). Mr. Lindsey was upfront about the argument he wanted to raise: at the time he was sentenced, some parts of the Texas burglary statute were considered equivalent to generic burglary, but others (particularly Texas Penal Code § 30.02(a)(3)) were not—they could only count as "violent felonies" under the residual clause. The district court did not review any state-court records at the time of the original sentencing, so the court must have relied at least in part on the ACCA's residual clause when it imposed the 15-year sentence. The Fifth Circuit granted prefiling authorization on June 21, 2016. Pet. App. 11a–12a.

7. Despite the Fifth Circuit's explicit authorization to raise this claim, the district court decided that it "lack[ed] jurisdiction to consider Defendant's successive motion." Pet. App. 9a. Applying Fifth Circuit precedent, the court decided that it could not exercise jurisdiction over the motion unless Mr. Lindsey could "demonstrate that it is more likely than not that the Court relied on the residual clause of the Armed Career Criminal Act" when it sentenced him. Pet. App. 9a. Even without jurisdiction to review the merits, the district court also opined that Mr. Lindsey's "motion lacks substantive merit as well." Pet. App. 9a.

8. The Fifth Circuit granted a Certificate of Appealability, recognizing that reasonable jurists could debate "whether the district court had jurisdiction to consider Lindsey's successive § 2255 motion." Pet. App. 8a.

9. The Fifth Circuit ultimately affirmed the district court's dismissal of the case for lack of jurisdiction. Pet. App. 1a–5a. The court also refused to expand the Certificate of Appealability to include the merits of the case. Pet. App. 2a.

REASONS TO GRANT THE PETITION

I. THE COURT SHOULD GRANT THE PETITION BECAUSE LOWER COURTS ARE HOPELESSLY DIVIDED OVER THE GATEKEEPING AND JURISDICTIONAL STANDARDS THAT GOVERN AUTHORIZED MOTIONS UNDER 28 U.S.C. § 2255(h)(2).

A consistent nationwide application of the gatekeeping standards in 28 U.S.C. § 2255(h) is not too much to ask. But the lower courts are floundering. Only intervention by this Court can set the ship aright.

Before filing a "second or successive motion" for collateral relief under 28 U.S.C. § 2255, a federal prisoner's proposed 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. § 2255(h). Everyone agrees that *Johnson* announced the right kind of rule: it was *new*; this Court "made" the rule retroactive in *Johnson* itself or in *Welch*; and it was "previously unavailable" to prisoners sentenced before *Johnson*. If a proposed motion "contains" the rule in *Johnson*, and particularly if a Court of Appeals "certifie[s]" that proposition, then a prisoner has satisfied all of the statutory threshold requirements for a successive motion. He is entitled to a ruling on the merits.

Unfortunately, the lower courts have transmogrified this straightforward inquiry into multiple complex theoretical questions, and then have divided multiple ways on how to approach those theoretical questions. Rather than a coherent nationwide framework for analyzing successive *Johnson* motions, the lower courts have created a riddle, wrapped in a mystery, inside an enigma. Absent prompt intervention from this Court, the disaster will only grow worse.

A. Lower courts disagree about whether the *substantive* gatekeeping standard for successive petitions filed by state prisoners—28 U.S.C. § 2244(b)(2)—also governs federal prisoners' successive motions under § 2255(h).

In the Third, Fourth, Ninth, and Eleventh Circuits, a successive movant challenging a federal conviction or sentence only has to satisfy the substantive standard in 28 U.S.C. § 2255(h). *See Jones v. United States*, No. 20-71862, 2022 WL 1485185, at *8 (9th Cir. May 11, 2022); *In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017); *In re Bradford*, 830 F.3d 1273, 1276 n.1 (11th Cir. 2016); *United States v. MacDonald*, 641 F.3d 596 (4th Cir. 2011). But the Fifth Circuit requires the defendant to satisfy § 2244(b)(2), a statute which by its terms only applies to state prisoners filing successive challenges to their convictions or sentences. *See, e.g., United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), as revised (Aug. 14, 2018) (citing § 2244(b)(2), (4)).

Section 2255 incorporates *part of* § 2244. A federal prisoner who wishes to file a successive motion to vacate must convince the court of appeals to "certify" his proposed motion "as provided in section 2244." 28 U.S.C. § 2255(h). This is sometimes described as obtaining "prefiling authorization." For its part, Section 2244 provides both *substantive* standards and *procedural* requirements for *state* prisoners who wish to file successive petitions for habeas corpus.

The procedural rules for state prisoners are set out in § 2244(b)(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.

Of those procedural rules, § 2244(b)(3)(A) is clearly incorporated by § 2255(h), and § 2244(b)(3)(B) and (D) can be applied without controversy.

Lower courts appear to agree that appellate courts should evaluate proposed § 2255 motions under § 2244(b)(3)(C)'s *prima facie* standard. *See, e.g.*, *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997) ("We take the phrase 'as provided in section 2244,' which appears in section 2255, to mean that in considering an application under section 2255 for permission to file a second or successive motion we should use the section 2244 standard, and thus insist only on a prima facie showing of the motion's adequacy.").

But the courts disagree about whether *federal* prisoners must satisfy the *substantive* standard for state prisoners articulated in § 2244(b)(2), or if it is sufficient to satisfy the substantive standards in § 2255(h). Those two substantive standards are "quite similar" but not identical. *MacDonald*, 641 F.3d at 609; *see also Jones*, 2022

WL 1485185, at *8 ("The tests also differ in important ways."). The "new rule" prong for *state* prisoners, § 2244(b)(2)(A), provides:

> (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.

(Emphasis added). The analogous "new rule" prong for *federal* prisoners 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* . . . (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)(2) (emphasis added).

Comparing these parallel provisions, "there is a slight difference between the two sections." *Hoffner*, 870 F.3d at 307 n.9. "Section 2244(b)(2)(A) asks whether a claim 'relies on' a qualifying new rule. Section 2255(h) asks whether the motion 'contain[s]' a qualifying new rule." *Id.* (citations omitted).

Under the better-reasoned view, "§ 2244(b)(2) sets forth the controlling standard for state prisoners, and § 2255(h) spells out the standard applicable to those in federal custody." *MacDonald*, 641 F.3d at 609. Under this text-driven view, a successive § 2255 motion need only "contain" the new rule in *Johnson*. 28 U.S.C. § 2255(h); *see also Bradford*, 830 F.3d at 1276 n.1 (Section 2255(h) "cannot incorporate § 2244(b)(2) because § 2255(h) and § 2244(b)(2) provide different requirements for the prima facie case that an applicant must make to file a successive habeas petition or motion."); *Raines v. United States*, 898 F.3d 680, 692 (6th Cir. 2018)

(Cole, C.J., concurring) (Section 2244(b)(4) "focuses on what a 'claim' requires, while § 2255(h) focuses on what a 'motion must . . . contain.' This 'difference in language'—in one section, what a claim requires; in the other, what a motion requires—'demands a difference in meaning.'").

Even so, several appellate courts have stated that a federal prisoner in Petitioner's shoes must show that his claim "relies on" the new rule in *Johnson* to satisfy the gatekeeping standard. Courts on both sides of the § 2244(b)(2) divide use this language. *See, e.g., United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017) ("The threshold question is whether Defendant's claim relies on the rule announced in *Johnson II* such that he may bring that claim in a second or successive § 2255 motion."); *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017) ("We now hold that whether a claim 'relies' on a qualifying new rule must be construed permissively and flexibly on a case-by-case basis."); *Donnell v. United States*, 826 F.3d 1014, 1016 (8th Cir. 2016) ("Section 2244(b)(2)(A) requires certification that a claim 'relies on' a new rule, and it makes sense to interpret § 2255(h)(2) similarly despite a modest difference in wording."); *cf. Massey v. United States*, 895 F.3d 248, 249–50 (2d Cir. 2018) (the motion must "*contain[ ]* a claim that *relies on* a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.").

B. Most circuits have held that a *district court* must conduct its own "gatekeeping" analysis of a federal prisoner's motion, even after the circuit court grants authorization under § 2255(h).

For a state prisoner's successive petition for habeas corpus, appellate authorization is only the first threshold requirement. After the Court of Appeals

authorizes the filing of a successive "application," the prisoner must surmount a second gate in "district court": he must "show[ ]" that each claim within that application "satisfies the requirements of this section." § 2244(b)(4). Section 2255 has no parallel procedure. *Cf.* 28 U.S.C. § 2255(h).

Yet most circuit courts—including the Fifth Circuit—have held that a *federal* prisoner must also surmount a second "gatekeeping" step in district court. Judge Posner's opinion in *Bennett v. United States* was early and influential:

> The [Court of Appeals's] grant [of authorization] is, however, it is important to note, tentative in the following sense: the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion. 28 U.S.C. § 2244(b)(4). The movant must get through two gates before the merits of the motion can be considered

Bennett, 119 F.3d at 470. Almost all of the regional courts agree. *See United States v. Peppers*, 899 F.3d 211, 220 (3d Cir. 2018) ("But, even after we authorize a second or successive petition, § 2244 still requires the district court to 'dismiss any claim presented in a second or successive application . . . unless the applicant shows that the claim satisfies the [gatekeeping] requirements[.]"); *United States v. Murphy*, 887 F.3d 1064, 1067–1068 (10th Cir. 2018); *Massey*, 895 F.3d at 250–251 (holding that the district court should have dismissed the authorized successive motion without reaching the merits); *(Darnell) Moore v. United States*, 871 F.3d 72, 85 (1st Cir. 2017) ("We have left much work for the district court. That is by necessity, as the district court is required to redo the very analysis performed in this opinion before entertaining a successive § 2255 motion."); *In re Embry*, 831 F.3d 377, 378 (6th Cir.

2016) ("[T]he district court is free to decide for itself whether Embry's claim relies on a new rule made retroactive by the Supreme Court, see 28 U.S.C. § 2244(b)(4)."); *In re (Jasper) Moore*, 830 F.3d 1268, 1271–1272 (11th Cir. 2016); *(Kamil) Johnson v. United States*, 720 F.3d 720, 720–721 (8th Cir. 2013); *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000).

C. The circuits are divided about whether the district court gatekeeping inquiry is a jurisdictional requirement, or a waivable claims-processing rule.

Many courts—including the Fifth Circuit—have stated that the district-court gatekeeping inquiry is a *jurisdictional* prerequisite to resolving the merits. *See, e.g.*, *Wiese*, 896 F.3d at 724. But the Sixth Circuit and the Government disagree. This is another circuit conflict that can only be settled by Supreme Court intervention.

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(b)(4) gatekeeping analysis to be "jurisdictional," even for § 2255(h) motions. *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."); *Wiese*, 896 F.3d at 724 (ascribing "jurisdictional" significance to the district court's gatekeeping analysis); *United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019) ("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.").

But the Sixth Circuit has held that the substantive 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. Lindsey, 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. That was the only "jurisdictional" prerequisite for securing a merits 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" by the district court. *Id.* at 438. Section 2255(h) governs successive 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.).

2. The Government agrees that the Sixth Circuit is correct and the Fifth Circuit is incorrect: the substantive gatekeeping requirements in § 2255(h) are non-jurisdictional.

For its part, the Government agrees with Petitioner on this point. *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 jurisdictional 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.

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

The circuits are also hopelessly divided over the burden of proof a successive movant must meet at the gatekeeping stage. This division of authority 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. *Peppers*, 899 F.3d at 216; *Geozos*, 870 F.3d at 895–896; *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017).

The First, Fifth, Eighth, Tenth, and Eleventh Circuits have all embraced a much 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).

The Eleventh Circuit even holds that the residual clause must have been the *sole* basis for the enhancement:

> To prove a *Johnson* claim, the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence. If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely *or as an alternative basis for*

> *the enhancement*, then the movant has failed to show that his enhancement was due to use of the residual clause.

Beeman v. United States, 871 F.3d 1215, 1221–1222 (11th Cir. 2017) (emphasis added). This is an extraordinary position. A defendant whose sentence was enhanced under both the enumerated offense and residual clauses because of a non-generic burglary offense could *never* obtain relief from his ACCA sentence: his pre-*Johnson* direct appeal would be doomed from the start, because the residual clause would suffice to uphold the sentence, and his post-*Johnson* § 2255 motion would be doomed because he could not show that the residual clause was the sole subjective basis of the enhancement. That approach has to be wrong.[2]

This Court is the only one who can resolve this dispute.

E. These conflicts cry out for resolution.

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

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[2] The Eleventh Circuit's harsh approach is also inconsistent with *Welch v. United States*, 578 U.S. 120, 125 (2016), because there the district court explicitly relied on "both . . . the elements clause, 18 U.S.C. § 924(e)(2)(B)(i), and the residual clause, § 924(e)(2)(B)(ii)." *Id.* at 125. That did not change the fact that Welch asserted and relied on the new rule announced in *Johnson*.

plainly provided. This case typifies the "drastic" consequences that flow from mislabeling a requirement as jurisdictional. *See Gonzalez*, 565 U.S. at 141.

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).

Consider all the work the Fifth Circuit threw away: a three-judge panel of that court granted pre-filing authorization in June 2016. Pet. App. 11a–12a. The parties and the district court labored over the case for more than three and one-half years. Pet. App. 9a–10a. Then, another Fifth Circuit judge granted a certificate of appealability on the jurisdictional question. Pet. App. 7a–8a. More than a year later, after a three-judge panel considered the case, the Court ultimately decided this was a case that never should have made it across the early threshold.

2. 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. In other words, if Congress does not clearly describe a rule as jurisdictional, it isn't. And Congress has not clearly described the *Wiese-Clay*

standards as jurisdictional. Indeed, it is not clear that Congress ever wanted people in Mr. Lindsey's shoes to prove *anything* about a sentencing court's "reliance" or "mindset." Section 2255(h) asks only whether the successive motion "*contains*" the right kind of rule. (Emphasis added).

3. *Gonzalez* analyzed a nearly identical statutory mechanism: Congress imposed a procedural requirement (issuance of a COA) and offered substantive rules governing that requirement. This Court held that the substantive rules were nonjurisdictional. The case concerned certificates of appealability under 28 U.S.C. § 2253. The certificate of appealability in *Gonzalez* was deficient; the question was "whether that defect deprived the Court of Appeals of the power to adjudicate *Gonzalez*'s appeal." *Id.* at 141. The Court held that the defect was not jurisdictional. The only part of the COA statute that is clearly jurisdictional is the *procedural* demand found in § 2253(c)(1)—a court or judge must issue a COA before the Court of Appeals can rule on the merits of an appeal. *Gonzalez*, 565 U.S. at 142. Unless and until that happens, appellate courts lack jurisdiction to resolve the merits. *Id.* (citing *Miller–El v. Cockrell*, 537 U.S. 322 (2003)).

But the *substantive* requirements for a valid COA are *not* jurisdictional:

> The parties also agree that § 2253(c)(2) is nonjurisdictional. That is for good reason. Section 2253(c)(2) speaks only to when a COA may issue—upon "a substantial showing of the denial of a constitutional right." It does not contain § 2253(c)(1)'s jurisdictional terms. *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). This passage should resolve this petition entirely in Mr. Lindsey's favor.

Like the COA statute, the pre-filing authorization statute has only one mandatory jurisdictional requirement, and it is *procedural*:

> (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. § 2255(h) (emphasis added). The issuance of authorization operates just like the issuance of a COA—once secured, the reviewing court gains jurisdiction to decide the case.

4. The *Wiese-Clay* inquiry is difficult, unpredictable, extra-statutory, and inconsistent with this Court's postconviction jurisprudence. There is no reason to give it jurisdictional significance. The Fifth Circuit has held that the *movant* cannot rely on intervening decisions, even substantive ones, because they are "of no consequence to determining the mindset of a sentencing judge" at the time of sentencing. *See Wiese*, 896 F.3d at 725. But this Court has held that a defendant *can* rely on new, non-constitutional substantive rules on collateral review. *See Bousley v. United States*, 523 U.S. 614, 621 (1998) ("[I]t would be inconsistent with the doctrinal

underpinnings of habeas review to preclude petitioner from relying on" intervening substantive, non-constitutional decisions.).

5. This Court held in *James* that the application of the ACCA's residual clause was a question of *statutory interpretation*, not an "judicial factfinding." *James*, 550 U.S. at 213. 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.

6. Even if the Fifth Circuit were right—a movant must "prove" by a preponderance of the evidence that the sentencing court "relied on" the ACCA's residual clause, and this requirement is "jurisdictional"—this Court would still need to grant certiorari to resolve the conflicts. The gatekeeping requirements for successive § 2255 motions should be applied equally throughout the nation. It makes no sense to condition the availability of post-conviction review on the accident of geography.

It would be "passing strange if, after" a defendant obtains authorization from a panel of the Court of Appeals; obtains a merits ruling from the district court; *and* "a COA has issued, each court of appeals adjudicating an appeal were duty bound" to engage in the complex analysis demanded by *Wiese* and *Clay*. *Gonzalez*, 565 U.S. at 143. To whatever extent § 2255(h) invites or allows the *Wiese-Clay* focus on the

historical question of what the sentencing judge was thinking about, the inquiry is non-jurisdictional. But if the inquiry *is* jurisdictional, it should apply everywhere.

F. Properly understood and applied, § 2255(h)(2) provides relief to a defendant whose ACCA sentence depends upon a non-generic residential burglary.

"Increasing a defendant's sentence under the [ACCA residual] clause denies due process of law." *Johnson*, 135 S. Ct. at 2557. That much is known. But what does it mean to say that a defendant's sentence was increased "*under*" ACCA's residual clause? The problem can be illustrated by the following hypothetical: imagine four defendants who have identical criminal records. On three previous occasions, each of these defendants (aided and abetted by one another) committed the crime that Texas calls "burglary of a habitation." Each defendant is subsequently arrested by federal authorities for possessing a firearm after felony convictions, and as luck would have it, all four of them are sentenced under the Armed Career Criminal Act in the same federal courthouse on October 20, 2008 (the same day Petitioner was sentenced), but by four different district judges.

- In Albert's case, the judge announces that Texas burglary of a habitation is the generic, enumerated offense of "burglary," so it is a violent felony.
- In Bob's case, the judge announces that Texas burglary of a habitation is a residual-clause violent felony.
- In Carl's case, the judge—gravely mistaken or confused—declares that Texas burglary of habitation satisfies ACCA's elements clause.
- In David's case, the judge applies ACCA but says nothing about the legal analysis.

In any sensible system, these four sentences would stand or fall together. Texas burglary either *is* a violent felony, or it *is not*. If these defendants (or Petitioner) had appealed their sentences prior to *Johnson*, then appellate courts would have no trouble invoking the residual clause to affirm. At the time, appellate courts usually recognized that it didn't matter *which* clause made a crime violent, so long as the "violent felony" classification was correct.

More importantly, the *meaning* of "burglary" did not change between 2010 (when Mr. Lindsey was sentenced) and the present. True, federal courts often struggled to interpret the statute correctly, and for a while there was confusion about what it meant for a prior offense to be divisible. But ACCA has always meant the same thing. If Texas burglary is non-generic, it has *always* been non-generic. If the residual clause was the only *lawful* basis to "increase a defendant's sentence," then (in a very real sense) these defendants' sentences were all *increased* under ACCA's residual clause, no matter what the sentencing judge thought or said. Unfortunately, lower courts have not all agreed with this analysis.

1. Regardless of whether a residential burglary offense was "generic," it could always be classified as violent under the residual clause.

This Court explicitly held in *Arthur Taylor* that the Government was "free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement" under the residual clause. 495 U.S. at 600 n.9. At the time, the Fifth Circuit was more than willing to affirm an ACCA-enhanced sentence under the residual clause, if the Government bothered to raise that argument. *See United States v. Ramirez*, 507 F. App'x 353, 354 (5th Cir. 2013).

This Court repeatedly suggested that residential burglary was the quintessential residual-clause offense. In 2004, this Court described burglary as the "classic example" of a crime satisfying the related residual clause in 18 U.S.C. § 16(b):

> A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, *but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.*

Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) (emphasis added). The Court picked up that same thread in *James v. United States*, 550 U.S. 192 (2007). *James* held that Florida *attempted* burglary was a violent felony under ACCA's residual clause because it presented a risk of confrontation similar to generic burglary. The enumerated offense of generic burglary provided the "baseline from which to measure whether other similar conduct" satisfied that clause. *Id.* at 203. Because attempted burglary presented the exact same risks as generic burglary, it was a residual-clause violent felony.

2. Recognizing the role that the residual clause played, many courts considered and even granted *Johnson*-based motions where a non-generic burglary gave rise to an ACCA enhancement.

Because the residual clause was always a backstop preventing prisoners from challenging mistaken conclusions about "generic" burglaries, many courts have held that an ACCA sentence based on non-generic burglaries is unconstitutional and subject to collateral attack under *Johnson*. The "vast majority" of district judges—who best understood how sentencing decisions were made prior to *Johnson*—were willing to grant relief under the theory that they "might" have relied on ACCA's

residual clause. *Thrower v. United States*, No. 04-CR-0903, 2017 WL 1102871, at *4 (E.D.N.Y. Feb. 13, 2017), and cases cited therein. "[T]he vast majority of the district courts that have considered the issue have decided that a petitioner meets his burden of proving constitutional error if the record is unclear and the petitioner shows that the sentencing court may have relied on the residual clause in calculating his sentence." *Id.* As another district judge explained:

> Prior to *Johnson*, regardless of *Descamps* and the alleged invalidity of utilizing the modified categorical approach concerning the Washington State residential burglary statute, Defendant's 1996 residential burglary conviction could have been a predicate "violent felony" under the residual clause. . . . As such, until *Johnson*, Defendant's 1996 residential burglary conviction remained a "violent felony" through the ACCA residual clause.

United States v. Gomez, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016) (citing *James* and *Arthur Taylor*); *see also Hardeman v. United States*, 1:96-CR-192 & 1:16-CV-703, 2016 WL 6157433, at *2–4 (W.D. Tex. Oct. 21, 2016) (explaining that the Government "continued" to argue that non-generic Texas burglaries were still violent felonies under the residual clause "until *Johnson* was decided," and rejecting Government's attempt to ignore *Johnson*'s impact on the analysis of non-generic burglaries); *see also In re Adams*, 825 F.3d 1283, 1284 (11th Cir. 2016) (allowing a defendant to challenge the classification of a prior burglary offense under *Johnson* and *Descamps* in a successive § 2255 motion).

3. Appellate courts tend to treat *Johnson* error as a question of *historical fact*, rather than abstract legality, but they are divided over how that historical question should be decided.

For good or for ill, the circuit courts that have addressed the question thus far have treated *Johnson* error as a historical question: if a sentencing judge subjectively

applied ACCA's residual clause (or might have done so), the defendant suffered *Johnson* error. But if a sentencing judge expressly applied one of the other clauses—even if that decision turns out to be error—then most appellate courts would deny post-conviction relief under *Johnson*.

These concerns probably underly the division over the burden a defendant must satisfy at the gatekeeping stage. Recall that the Third, Fourth, and Ninth Circuits have all adopted a *permissive* approach: if a defendant shows that the sentencing court *might have* relied on the residual clause, then the defendant satisfies the gatekeeping standard and is entitled to a ruling on the merits. *Peppers*, 899 F.3d at 216; *Geozos*, 870 F.3d at 896; *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017). Once the case proceeds to the merits in these circuits, the defendant is permitted to utilize intervening precedent to show that the enumerated offense and elements clauses do not justify the sentence.

Because the legality of Mr. Lindsey's ACCA sentence depends upon whether his Texas burglary convictions were for generic offenses, this case presents an ideal vehicle to resolve the various gatekeeping disputes.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT COURTS DISAGREE ABOUT WHETHER TRESPASS-PLUS-CRIME BURGLARY OFFENSES ARE VIOLENT FELONIES.

Given identical inputs—a state crime labeled "burglary" committed whenever a trespasser commits some other crime inside a building, even where that crime does not require proof of specific criminal intent—the Fifth and Seventh Circuits have reached opposite conclusions. In the Seventh Circuit, the trespass-plus-crime theory

is not considered generic burglary. *Van Cannon* v. *United States*, 890 F.3d 656, 664 (7th Cir. 2018); *accord Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019). In the Fifth Circuit, the trespass-plus-crime offense defined in Texas Penal Code § 30.02(a)(3) is considered generic burglary. *See United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019) (en banc); *accord United States v. Wallace*, 964 F.3d 386, 388–389 (5th Cir. 2020).

These two circuits do not necessarily disagree about the "generic" definition of burglary. The element that has always distinguished burglary from mere trespass is the *intent to commit a crime* inside the building. 4 William Blackstone, *Commentaries on the Laws of England* 227 (1769) ("[I]t is clear, that [the] breaking and entry must be with a felonious intent, otherwise it is only a trespass."). When Congress originally passed the ACCA, it included this specific-intent element within its definition of "burglary." Pub. L. 98-473, § 1803(2) (1984). Even after that statutory definition was inadvertently deleted, this Court agreed that intent to commit another crime remained an "element" of the "generic" definition of burglary. *Taylor v. United States*, 495 U.S. 575, 598 (1990).

Texas was the first (or possibly the second)[3] jurisdiction to define a form of "burglary" that did not require proof of specific intent to commit another felony inside

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[3] In 1969, North Carolina created a form of *reverse* burglary, which prohibited breaking *out* of a dwelling house after committing a crime therein. *See* 1969 N.C. Laws, c. 543, § 2, codified at N.C. Gen. Stat. § 14-53 ("G.S. 14-53 is rewritten to read as follows: 'G.S. 14-53. **Breaking out of dwelling house burglary**. If any person shall enter the dwelling house of another with intent to commit any felony or larceny therein, *or being in such dwelling house, shall commit any felony or larceny therein,*

the premises. Texas's pioneering theory "dispenses with the need to prove intent" when the actor actually commits a predicate crime inside the building after an unlawful entry. *DeVaughn* v. *State*, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988) (internal quotation omitted). Judge Sykes has helpfully dubbed this new theory "trespass-plus-crime." *Van Cannon*, 890 F.3d at 664. Four states have now expanded their definition of "burglary" to include the trespass-plus-crime theory: Minnesota, *see* Minn. Stat. Ann. § 609.582 (eff. Aug. 1, 1988); Montana, *see* Mont. Code § 45-6-204(1)(b) & (2)(a)(ii) (eff. Oct. 1, 2009); Tennessee, *see* Tenn. Code Ann. § 39-14-402(a)(3) (eff. July 1, 1995); and Texas, *see* Tex. Penal Code § 30.02(a)(3) (eff. 1974). Three forms of Michigan "home invasion" incorporate the trespass-plus-crime theory. *See* Mich. Comp. L. § 750.110a(2), (3), (4)(a).

This Court could resolve this circuit split in this case, but there is no need to. The Fifth Circuit concluded that there was no subject matter jurisdiction over Mr. Lindsey's authorized § 2255(h)(2) motion. Despite this purported lack of jurisdiction, the Fifth Circuit went on to address the merits of his claim. Pet. App. 2a–3a. Mr. Lindsey asks only that this Court acknowledge that the merits are *debatable*, which would entitle him to the expansion of the COA he sought below.

The Texas Court of Criminal Appeals has never directly addressed whether a trespasser who commits a reckless, negligent, or strict-liability crime is guilty of

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and shall, in either case, *break out of such dwelling house in the nighttime*, such person shall be guilty of burglary.'") (emphasis added).

burglary under § 30.02(a)(3). But the court has addressed an analogous question with regard to murder, a statute that shares an identical structure to burglary.

To be sure, the state court has held that it is *permissible* to convict someone under Texas Penal Code § 30.02(a)(3) where the trespasser enters and then "subsequently forms" specific intent "and commits or attempts a felony or theft." *DeVaughn*, 749 S.W.2d at 65 (quoting Seth S. Searcy, III and James R. Patterson, *Practice Commentary* 144, Vernon's Texas Codes Annotated (West 1974)); *see also Flores v. State*, 902 S.W.2d 618, 620 (Tex. App.—Austin 1995, pet. ref'd) ("Prosecution under section 30.02(a)(3) is appropriate when the accused enters without effective consent and, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts to commit a felony or theft.").

But that does not mean the intent is *necessary* for conviction. *DeVaughn* recognized that Subsection (a)(3) "supplants the specific intent" that would otherwise be required under Texas Penal Code § 30.02(a)(1) and (a)(2) with the commission of a predicate offense. *Id.* Based on this language *allowing* conviction where an offender forms specific intent after entry, the Fifth Circuit has decided that Texas *requires* proof of specific intent before convicting under Subsection (a)(3). But the plain statutory text and the Court of Criminal Appeals's analysis of a nearly identical statute together strongly suggest that the crime is broader than generic burglary. Multiple appellate decisions from lower courts confirm that formation of specific intent is *not* an element under § 30.02(a)(3).

In Texas, the crimes of murder and burglary share a similar structure:

Murder (Penal Code § 19.02(b)):	**Burglary (Penal Code § 30.02(a)):**
A person commits an offense if he:	A person commits an offense if, without the effective consent of the owner, the person:
(1) **intentionally or knowingly** causes the death of an individual;	(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) **intends to cause serious bodily injury** and commits an act clearly dangerous to human life that causes the death of an individual; or	(2) remains concealed, **with intent to commit a felony, theft, or an assault**, in a building or habitation; or
(3) **commits or attempts to commit a felony**, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt . . . he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.	(3) enters a building or habitation and **commits or attempts to commit a felony, theft, or an assault.**

For murder, the Court of Criminal Appeals has held that this this structure unambiguously *eliminates* the requirement to prove additional *means rea* beyond that required for commission of the predicate offense: "It is significant and largely dispositive that Section 19.02(b)(3) omits a culpable mental state while the other two subsections in Section 19.02(b) expressly require a culpable mental state." *Lomax v. State*, 233 S.W.3d 302, 304 (Tex. Crim. App. 2007) (quoting *Aguirre* v. *State*, 22 S.W.3d 463, 472–473 (Tex. Crim. App. 1999)); *id.* at 307 n.14 ("It is difficult to imagine how Section 19.02(b)(3), with its silence as to a culpable mental state, could be construed to require a culpable mental state for an underlying felony for which the Legislature has plainly dispensed with a culpable mental state."). It stands to reason that the court would interpret § 30.02(a)(3) the same way it interpreted

§ 19.02(b)(3)—if the predicate offense does not require specific intent, then there is no need to prove that mental state.

The vast majority of Texas intermediate courts have recognized burglary under § 30.02(a)(3) does not require proof of specific intent to commit another crime. In other words, commission of a negligent felony or a reckless assault while trespassing indoors satisfies the "elements" of Subsection (a)(3), even if the trespasser never formed the intent to commit that crime. *See, e.g., Duran v. State*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (entry plus commission of reckless aggravated assault); *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App. Oct. 3, 2013) (entry plus negligently or recklessly injuring an elderly person);

When listing the elements of "burglary" under § 30.02(a)(3), Texas appellate decisions routinely recognize that felonies with reckless or even negligent *mens rea* are sufficient to give rise to liability under § 30.02(a)(3):

- *Daniel v. State*, 07-17-00216-CR, 2018 WL 6581507, at *3 (Tex. App.—Amarillo Dec. 13, 2018, no pet.): "All the State was required to prove was that he entered the residence without consent or permission and while inside, assaulted or attempted to assault Phillips and Schwab." *Id.* And "a person commits assault when he intentionally, knowingly, *or recklessly* causes bodily injury to another." *Id.*, 2018 WL 6581507, at *2 (emphasis added).
- *State v. Duran*, 492 S.W.3d 741, 743 (Tex. Crim. App. 2016) (recognizing reckless assault as a predicate for § 30.02(a)(3) liability);
- *Scroggs v. State*, 396 S.W.3d 1, 10 & n.3 (Tex. App.—Amarillo 2010, pet. ref'd, untimely filed) (same);
- *Wingfield v. State*, 282 S.W.3d 102, 105 (Tex. App.—Fort Worth 2009, pet. ref'd) (same);

- *Alacan v. State*, 03-14-00410-CR, 2016 WL 286215, at *3 (Tex. App.—Austin Jan. 21, 2016, no pet.) (same);
- *Crawford v. State*, 05-13-01494-CR, 2015 WL 1243408, at *2 (Tex. App.—Dallas Mar. 16, 2015, no pet.) (same);
- *Johnson v. State*, 14-10-00931-CR, 2011 WL 2791251, at *2 (Tex. App.—Houston [14th Dist.] July 14, 2011, no pet.) (same);
- *Torrez v. State*, 12-05-00226-CR, 2006 WL 2005525, at *2 (Tex. App.—Tyler July 19, 2006, no pet.) (same);
- *Guzman v. State*, 2-05-096-CR, 2006 WL 743431, at *2 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.) (same);
- *Brooks v. State*, 08-15-00208-CR, 2017 WL 6350260, at *7 (Tex. App.—El Paso Dec. 13, 2017, pet. ref'd) (listing robbery by reckless causation of injury as a way to prove § 30.02(a)(3)); and
- *Battles v. State*, 13-12-00273-CR, 2013 WL 5520060, at *1 & n.1 (Tex. App.—Corpus Christi Oct. 3, 2013, pet. ref'd) (recognizing that the predicate felony—injury to an elderly individual under Texas Penal Code § 22.04—could be committed with recklessness or with "criminal negligence.").

Particularly in light of the reasoning of *Lomax*, these cases eliminate the inference that Texas requires proof of "formation of specific intent" to convict under § 30.02(a)(3). Under the reasoning of *Van Cannon*, 890 F.3d at 664, and *Chazen v. Marske*, 938 F.3d 851, 860 (7th Cir. 2019), that makes § 30.02(a)(3) non-generic. But the Fifth Circuit has held that it *is* generic. At this stage of the case, Mr. Lindsey merely asks that this *debatability* be acknowledged by means of a COA, and that the case be remanded to the Fifth Circuit with instructions to decide the merits.

CONCLUSION

The Court should grant the petition and set the case for a decision.

Respectfully submitted,

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