NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN PARKER MURPHY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question in this case has arisen with great frequency in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). When a *Johnson* movant would not be an Armed Career Criminal if sentenced today, how can he show that his sentence is infected with constitutional error?

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PETITION FOR A WRIT OF CERTIORI

Petitioner, John Parker Murphy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is available in online databases at *United States v. Murphy*, 887 F.3d 1064 (10th Cir. 2018). The order of the district court denying Mr. Murphy's motion to vacate is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on April 17, 2018. No petition for rehearing was filed. This petition is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

(e)(1) In the case of a person who … has three previous convictions … for a violent felony …, such person shall be … imprisoned not less than fifteen years …. (2) As used in this subsection—

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

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

18 U.S.C. § 924(e).

STATEMENT OF THE CASE

This case requires the Court to determine whether John Parker Murphy's sentence should be vacated in light of the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On March 21, 2008, Mr. Murphy was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). R. vol. II at 8. He pled guilty to that charge on July 7, 2008. *Id.* at 12. Ordinarily, the maximum sentence for a conviction of felon in possession of a firearm is 10 years' imprisonment, 18 U.S.C. § 924(a)(2), and three years of supervised release. 18 U.S.C. §§ 3559, 3583.

Under the ACCA if a defendant convicted of felon in possession of a firearm "has three previous convictions . . . for a violent felony or a serious drug offense, or both," then the defendant must be "imprisoned not less than fifteen years," 18 U.S.C. § 924(e), and may be placed on supervised release for up to five years. 18 U.S.C. §§ 3559, 3583. Without the ACCA designation, Mr. Murphy would have had a base offense level of 16. R. vol. III at 26. With a three-point reduction for acceptance of responsibility, his total offense level would have been 13. See U.S.S.G. §3E1.1 (three acceptance points given for offense level of 16 or greater). His resultant guideline range would have been 33-41 months. He pleaded guilty to the felon in possession charge thinking that his

range would be 33-41 months. R. vol. II at 42 ("I signed a plea agreement, thought it was going to be 33 months. Look at this, it is 15 years. I'm mortified. I really don't have anything more to say.").

Prior to sentencing, however, the Probation Office issued a Presentence Investigation Report ("PSR") which determined that Mr. Murphy qualified for an increased sentence under the ACCA based on three prior burglary convictions: The first was a burglary conviction on October 7, 1988, in the Circuit Court for the County of Douglas, Oregon (Docket No. J88-2117); the second conviction was on April 11, 1989, in the Circuit Court for the County of Deschutes, Oregon (Docket No. 89-CR-0101-WE); and the third burglary conviction occurred on February 8, 2005, in the 6th Judicial District Court in Gillette, Wyoming. R. vol. III at 26.

On the date of sentencing, both parties were in agreement that Mr. Murphy's burglaries were qualifying ACCA felonies. As defense counsel explained, "any argument I make it [sic] going to be ultimately moot." R. vol. 44. Accordingly, based on the determination that Mr. Murphy was an Armed Career Criminal, the sentencing court sentenced Mr. Murphy to 180 months' imprisonment and five years of supervised release, which was the statutory mandatory minimum sentence for an ACCA conviction. R. vol. II at 16. Specifically,

like defense counsel, the sentencing court ruled that "they are viable felonies. I don't see any way of avoiding them." R. vol. II at 38.

At the time that Mr. Murphy was sentenced in 2008, the Ninth Circuit had recently heard argument challenging the status of Oregon burglary as an ACCA predicate. The Ninth Circuit issued its decision on March 16, 2009, holding that Oregon burglary was not a violent felony under the enumerated offenses clause, but nonetheless qualified as a burglary predicate under the residual clause. *United States v. Mayer*, 560 F.3d 948, 962 (9th Cir. 2009). On June 23, 2009, Mr. Murphy filed an initial motion under 28 U.S.C. § 2255, arguing that his counsel was ineffective for, *inter alia*, failing to object to the ACCA designation. R. vol. II at 27. The district court denied his claim on the grounds that, even if his attorney had objected, the three burglary convictions would have nonetheless qualified as violent felonies under the ACCA. *Id.* at 29. Following *Johnson*, the Ninth Circuit has held that Oregon burglary convictions do not qualify as violent felonies under the ACCA. *United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016). Mr. Murphy is in the same posture as Mr. Mayer—prior to Johnson, his Oregon burglaries were "violent felonies" under the residual clause, and after Johnson they are not ACCA predicates at all.

On April 27, 2016, the Tenth Circuit authorized the filing of a second or successive application under 28 U.S.C. § 2255. *Id.* at 64. In his § 2255 motion

before the district court, Mr. Murphy argued that, after *Johnson*, his prior burglary convictions from Oregon and Wyoming no longer justify the ACCA sentencing enhancement because they could have qualified as violent felonies only under the residual clause. *Id.* at 66. Because he no longer has the three requisite qualifying predicates to designate him as an Armed Career Criminal, Mr. Murphy argued that there was no constitutional basis upon which ACCA sentence could rest. Mr. Murphy further argued that this was a *Johnson* claim because his claim of unconstitutionality was only ripe after *Johnson*. The district court dismissed his motion on the grounds that, because Mr. Murphy has not shown that the now-invalid residual clause played a role at his sentencing, his case does not implicate *Johnson v. United States*. *Id.* at 95. However, the district court issued a certificate of appealability. *Id.* at 97.

REASONS FOR GRANTING CERTIORARI

The Court should grant review in this case because the circuits are divided over how a movant can show sentencing error if he would not be an Armed Career Criminal under today's law. Mr. Murphy's continued incarceration as an Armed Career Criminal is a violation of due process under both the plain language of 28 U.S.C. § 2255 and this Court's precedent. Under 28 U.S.C. § 2255(a), a petitioner may challenge a sentence "imposed in violation of the Constitution or laws of the United States" and "is in excess of the maximum

authorized by law." This case presents a recurring issue of national importance. In short, now that the residual clause has been found unconstitutionally vague, and thus inapplicable, the Government cannot meet the burden to show that he has three prior convictions that would qualify as violent felonies and therefore Mr. Murphy's sentence is unconstitutional. Mr. Murphy would have been unable to raise such a claim before *Johnson*. Moreover, if the residual clause had not been in existence at that time, however, defense counsel would have had reason to more fully litigate the issue of whether Mr. Murphy's burglaries were generic. Defense counsel did not have any reason to press such an objection because the residual clause would have ensured that Mr. Murphy was ACCA-qualified regardless of whether the sentencing court classified his burglaries as generic or otherwise. This Court's prompt review is also warranted because of the important liberty interests at stake.

I. The Lower Courts Are In Acknowledged Conflict Over How A Movant Can Demonstrate Sentencing Error After *Johnson*.

Snyder, which was applied in the decision below, is in direct conflict with the law in the Fourth Circuit. As noted, the Tenth Circuit has held that if, based on the record and the "relevant background legal environment," a movant's sentence could have rested on a clause other than the residual clause at sentencing, a movant has not demonstrated sentencing error under *Johnson*. *United States v. Snyder*, 871 F.3d 1122, 1130 (10th Cir. 2017).

The Fourth Circuit's test flips the inquiry. The Fourth Circuit has held that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause, and therefore *may* be an unlawful sentence" in order to demonstrate *Johnson* error. *Winston v. United States*, 850 F.3d at 682 (4th Cir. 2017).

Acknowledging the common problem of ambiguous ACCA sentencing records, the *Winston* court noted that that "[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence." *Id.* (quoting *In re Chance,* 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declined to "penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony." *Id.*

The Fourth Circuit further cautioned that requiring a movant to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in "'selective application' of the new rule of constitutional law announced in *Johnson*," in violation of "'the principle of treating similarly situated defendants the same.'" *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error. In *Winston*, the court found that the *Johnson* error was not harmless because the movant's

prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. *Winston*, 850 F.3d at 682 n.4.

The Tenth Circuit's approach to this issue is directly at odds with the *Winston* decision. Under the *Winston* rule, Mr. Murphy would prevail because the sentencing court *may have* relied on the residual clause at sentencing. And the *Johnson* error was not harmless in this case because Mr. Murphy's prior convictions do not qualify as violent felonies under the remaining ACCA clauses.

One need only glance at a few district court decisions from within the Fourth Circuit to see that Mr. Murphy would have been granted relief under *Winston*. In *Cade v. United States*, 276 F. Supp. 3d 502, 507–08 (D.S.C. 2017), for example, a district court granted relief to a petitioner with prior burglary convictions even though the government argued that the enumerated offenses clause was the basis for the petitioner's ACCA enhancement. In that case, the government asserted that *Winston* was not applicable because the record revealed that the court at sentencing "specifically counted Petitioner's burglaries under the enumerated clause, rather than the residual clause." *Id.* The district court went on to explain:

> The fact that the [sentencing court] later accepted the Government's position that his burglaries counted as generic burglaries under the enumerated clause does not mean that the Court did so to the exclusion of the residual clause; it was simply not necessary

> to consider them under the residual clause, having already concluded that they counted under the enumerated clause. This is an example of a "non-essential conclusion[ ] a court may or may not have articulated on the record in determining the defendant's sentence."

Cade, 276 F. Supp. 3d at 507–08 (citing *Winston*, 850 F.3d at 682). Even though Mr. Cade's petition relied on *Mathis v. United States*, 136 S. Ct. 2243 (2016), in addition to *Johnson*, there was no question that his petition "'relie[d] on' *Johnson*, as he would not be entitled to relief without it." *Id.* at 508. Mr. Murphy's arguments are completely aligned with the arguments made by the petitioner in *Cade* and in *Cade* the petitioner was granted relief.

In another example, *United States v. Foster*, a petitioner filed *Johnson* motion alleging that his sentence was invalid even though the Fourth Circuit had explicitly found that his prior burglary convictions qualified as generic burglaries in his direct appeal. 2017 WL 2628887, at *3 (W.D. Va. June 19, 2017). Applying *Winston*, the district court (who was also the sentencing judge) explained that, under *Winston*, Mr. Foster was entitled to relief because "the residual clause *may have been* used by the prosecution to establish his status, although it was not." *Id.* (emphasis added). Given the outcome of *Cade* and *Foster* (as well as many other similar cases) it is clear that Mr. Murphy would be entitled to relief if he had been sentenced anywhere in the Fourth Circuit.

Indeed, dozens of other decisions demonstrate that the *Winston* case has been applied to petitioners in Mr. Murphy's position with favorable results.[1]

Moreover, in *Winston*, binding circuit precedent at the time of Mr. Winston's original sentencing held that his predicate conviction for Virginia robbery was an ACCA prior conviction squarely under the force clause. *Winston*, 850 F.3d at 683 (citing *United States v. Presley*, 52 F.3d 64, 69 (4th Cir. 1995)). Thus, the "background legal environment" of Mr. Winston's sentencing meant that his prior conviction would have qualified as an ACCA predicate under the force clause. Nonetheless, in *Winston*, the Fourth Circuit explained that "[a]lthough Winston's claim depends on the interplay between *Johnson II*, permitting post-conviction review of the ACCA-enhanced sentence, and *Johnson*

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[1] *See*, *e.g., Graham v. United States*, 276 F. Supp. 3d 509, 515 (D.S.C. 2017) (vacating conviction predicated on burglaries); *Dais v. United States*, No. 4:03-CR-00386-TLW-1, 2017 WL 3620048, at *5 (D.S.C. Aug. 23, 2017) (same); *Jones v. United States*, No. 4:02-CR-01017-TLW-1, 2017 WL 3620056, at *5 (D.S.C. Aug. 23, 2017) (same); *United States v. Hairston,* No. 4:04-CR-00008-1, 2018 WL 561861, at *3 (W.D. Va. Jan. 25, 2018) (same as to burglary and robbery convictions); *Pannell v. United States*, No. 7:02CR00002, 2018 WL 542978, at *3 (W.D. Va. Jan. 24, 2018) (same as to burglary, robbery, and malicious wounding convictions); *United States v. LaForce*, No. 1:08CR00027, 2017 WL 3331742, at *2 (W.D. Va. Aug. 4, 2017) (same as to burglary and robbery convictions); *Blackwell v. United States*, No. 4:10CR00012, 2017 WL 3167380, at *3 (W.D. Va. July 25, 2017) (same).

I, defining the scope of the force clause, Winston nonetheless relied to a sufficient degree on *Johnson II* to permit our present review of his claim." *Winston*, 850 F.3d at 682 n.4. In the same way, Mr. Murphy's claim depends on the "interplay" between *Johnson* and *Mathis*. If he were in the Fourth Circuit, Mr. Murphy would be entitled to relief because his claim still "relies on" *Johnson* to a significant degree: without *Johnson* his claim that he is serving an unconstitutional sentence would not be ripe for review. *Snyder* and *Winston* are therefore in direct conflict, and cannot be squared with one another.

The Tenth Circuit's rule requires a movant to show *Johnson* error by demonstrating that, under the "relevant background legal environment" at the time of sentencing, neither of the remaining violent felony clauses—the enumerated offenses clause or the force clause—would have captured the movant's prior convictions. *Id.* at 1130. This approach is misguided because it will lead to arbitrary results. Early in the course of the *Johnson* litigation, the Eleventh Circuit highlighted this issue when it questioned why a court would decline to grant relief when a person's sentence was no longer statutorily authorized—even if the "sentencing judge [had not] uttered the magic words 'residual clause.'" *In re Chance,* 831 F.3d 1335, 1340 (11th Cir. 2016). The panel opined that it would be inequitable to mandate the words "residual clause" actually appear in the record because such a step was never required at sentencing. *Id.*

Concerns over arbitrary application of *Johnson* also animated the Fourth Circuit's rule that a *Johnson* movant need only show that his sentence "*may have* been predicated on application of the now-void residual clause" in order to show *Johnson* error. *Winston*, 850 F.3d at 682 (emphasis added). Prior to *Johnson*, courts were not required to make specific findings, and counsel had no incentive to object, where serious crimes clearly fell within the residual clause. Accordingly, the Fourth Circuit declined to "penalize a movant for a court's discretionary choice not to specify" which clause it relied on. *Id.* And it declined to base its decision on "non-essential conclusions a court may or may not have articulated on the record in determining the defendant's sentence." *Id.*

In this way, the Tenth Circuit's rule creates yet another arbitrariness concern. Because the legal landscape was in constant flux in the decades prior to *Johnson*, and recreating the landscape at a particular point in time will undoubtedly prove both cumbersome and impractical. As one district judge aptly explained, "[a]ttempting to recreate the legal landscape at the time of a defendant's conviction is difficult enough on its own. But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal issues involved." *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). It will also mean that movants who are sentenced in 2005 may

be judged by a different standard for *Johnson* error than movants who were sentenced in 2010—even though their prior offenses may be the same.

The arbitrariness identified by the *Winston* panel is compounded when "decisions from the Supreme Court that were rendered since [sentencing]" can be ignored "in favor of a foray into a stale record." *Chance*, 831 F.3d at 1340. For example, this Court in *Mathis* emphasized that "[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements." *Id.* at 2257. Where the *Winston* court held that it was required to consider the interplay between *Johnson* and subsequent cases of this Court clarifying the scope of the violent felony definition, the *Snyder* panel applied stale and now-abrogated interpretations of this Court's precedent to the question of whether a *Johnson* error occurred.

Finally, the decision below does not square with the cautionary language in *Teague* about the "inequity resulting from the uneven application of new rules to similarly situated defendants." *Teague v. Lane*, 489 U.S. 288, 316 (1989). Already, hundreds of petitioners in Mr. Murphy's position have been released because they were enhanced on the basis of prior burglary or other

convictions that no longer qualify as violent felonies.[2] In other, similar cases, the United States *conceded* that relief was warranted where a petitioner could show that his ACCA sentence was invalid—and the United States waived procedural defenses, in many cases—including the ambiguous record issue that is the subject of this petition.[3] Still other petitioners—barred from relief by the rules created in the Tenth, Eleventh and First circuits—have sought relief through 28 U.S.C. § 2241 and have been released from their sentences under the savings clause of section 2255(e).[4] In short, the federal courts are awash with cases in which those in Mr. Murphy's position have been granted relief

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[2] A non-exhaustive list of cases in which ACCA sentences were vacated either in part or solely on the basis of prior burglary offenses after *Johnson* is as follows: *Mays v. United States*, 817 F.3d 728 (11th Cir. 2016); *United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016); *Ramey v. United States*, No. 2:03-CR-0220-CLS-JEO, 2015 WL 9268135, at *1 (N.D. Ala. Dec. 21, 2015). *United States v. Gray*, No. 2:06-CR-2017-LRS-1, 2016 WL 224111, at *4 (E.D. Wash. Jan. 19, 2016).

[3] *See, e.g.*, *United States v. Leonard Lee Estes*, Case No. 05-CR-00187-WYD, "United States' Answer to Defendant's 28 U.S.C. § 2255 Motion," ECF No. 41 at 6 (May 25, 2016) (conceding relief for individual with Colorado burglary predicates); *United States v. Joseph John Lewis*, Case No. 1:05-cr-00027-MSK-1, RESPONSE to Motion by USA as to Joseph John Lewis re 40 MOTION to Vacate under 28 U.S.C. 2255, Doc. No. 48 (same for Iowa burglary).

[4] *See, e.g.*, *Jahns v. Julian*, No. 2:16-CV-0239-JMS-DLP, 2018 WL 1566808, at *6 (S.D. Ind. Mar. 30, 2018); *Moreno v. Ives*, Case No. 17-cv-08497, Doc. No. 12; (January 22, 2018); *Smith v. Martinez*, 2018 WL 558996, (D. Ariz. Jan. 5, 2018).

and immediate resentencing because their predicates are no longer ACCA-qualifiers under today's law.

II. Mr. Murphy's Sentence Violates Due Process.

After *Johnson* and *Mathis*, many defendants whose prior convictions are not, in fact, ACCA qualifiers are serving unconstitutional sentences, and will remain in jail, doing more time than the law allows. Such a result is untenable. *Cf. Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (mem.) (Gorsuch, J., concurring) ("A plain legal error infects this judgment—a man was wrongly sentenced to 20 years in prison under a defunct statute…[W]ho wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?").

Under section 2255(a), a petitioner may challenge a sentence "imposed in violation of the Constitution or laws of the United States" and "is in excess of the maximum authorized by law." Requiring a defendant to serve above the statutory maximum allowable sentence thus violates due process, as several circuits have noted. *See, e.g.*, *United States v. Grier*, 475 F.3d 556, 572 (3d Cir. 2007) (Rendell, J., concurring) ("Due process requires . . . that the sentence for the crime of conviction not exceed the statutory maximum."); *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) ("[w]here, as here, [a petitioner]

was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated").

Although on collateral review the "[p]etitioner carries the burden in a collateral attack on a judgment," by a preponderance of the evidence, *see, e.g.*, *Hawk v. Olson*, 326 U.S. 271, 279 (1945), Mr. Murphy can meet this burden by showing that there has been "a deprivation of a constitutional right." *See, e.g.*, *United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000). *See also*, *e.g*. *David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998) ("burden is on the petitioner to make out a case for section 2255 relief," and he can meet this burden by showing that his sentence was "(1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack.") (quoting *Hill v. United States*, 368 U.S. 424, 426-27 (1962) (construing statute)). The catch-all fourth category includes claims that reveal "fundamental defect[s]" which, if uncorrected, will "result[ ] in a complete miscarriage of justice," or irregularities that are "inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 426-27.

Mr. Murphy can show such a deprivation of rights—and a fundamental a miscarriage of justice—by a preponderance of the evidence precisely because his sentence now exceeds the statutory maximum if he were sentenced today.

The Tenth Circuit has all but agreed that the Wyoming statute would no longer qualify as generic burglary today. Prior to *Johnson*, Mr. Murphy's claim for relief would have failed because his Oregon and Wyoming burglaries would have been ACCA predicates under the ACCA's residual clause. After *Johnson*, however, Mr. Murphy's continued incarceration is a violation of due process as he is statutorily ineligible for the sentence he is currently serving.

Mr. Murphy's prior burglary convictions plainly do not qualify under the force clause, and they are not so-called "generic" burglaries under the enumerated offenses clause. Generic burglary requires the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). Indeed, not every state conviction labeled "burglary" qualifies as an enumerated offense under the ACCA because not every burglary statute comports with the generic definition of burglary. Mr. Murphy's burglary convictions cannot qualify as "violent felonies" because the statutes he was convicted under are broader than generic burglary, and thus do not qualify as ACCA predicates following *Johnson*.

Mr. Murphy's Oregon burglary convictions do not qualify as violent felonies after *Johnson*. As explained above, at the time that Mr. Murphy was sentenced in 2008, the Ninth Circuit had heard argument challenging the

status of Oregon burglary as an ACCA predicate. The Ninth Circuit issued its decision on March 16, 2009, holding that Oregon burglary was not a violent felony under the enumerated offenses clause, but nonetheless qualified as a burglary predicate under the residual clause. *United States v. Mayer*, 560 F.3d 948, 962 (9th Cir. 2009) ("the district court did not err by determining that first-degree burglary under Oregon Revised Statutes section 164.225 is categorically a 'violent felony' under the ACCA's residual clause").

At the time of Mr. Murphy's Oregon burglary convictions, the Oregon burglary statute provided: "a person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein." Or. Rev. Stat. § 164.215. Oregon defines the term "building" as "any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein." Or. Rev. Stat. § 164.205(1). The federal, generic definition of burglary is "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Descamps*, 133 S. Ct. at 2283.

The Oregon burglary statute is therefore broader than the federal definition of burglary because Oregon's statute includes burglaries of *vehicles*, as well as buildings or other structures. *Descamps*, 133 S. Ct. at 2284 (vehicles are not "structures" for purposes of generic burglary). This was the basis of

the Ninth Circuit's ruling that Oregon first degree burglary cannot be a qualifying violent felony. *Mayer*, 560 F.3d at 962.

Indeed, many individuals have already been resentenced or released who had the same predicates as Mr. Murphy. *See*, *e.g.*, *United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016) (holding that defendant's two prior Oregon convictions or first-degree burglary did not qualify as violent felonies under the ACCA; vacating ACCA sentence; remanding for resentencing absent the ACCA enhancement). Even Mr. Mayer filed a habeas petition after *Johnson*; the district court in that case held that Mr. Mayer's ACCA sentence was no longer valid because his Oregon burglaries could only have qualified under the residual clause. *United States v. Mayer*, 162 F.Supp.3d 1080, 1096 (D. Or. Feb. 5, 2016) ("Defendant was not convicted of three predicate offenses under the ACCA, and he is not subject to the fifteen-year mandatory minimum"; holding that Oregon burglary not a violent felony under the ACCA; vacating ACCA sentence and ordering immediate release). Mr. Murphy is in the same posture as Mr. Mayer—prior to *Johnson*, his Oregon burglaries were "violent felonies" under the residual clause, and after *Johnson* they are not ACCA predicates at all.

Similarly, Mr. Murphy's Wyoming burglary conviction is not a violent felony under today's law. As the *Snyder* panel explained, *Mathis* abrogated

Tenth Circuit law holding that Wyoming burglary can sometimes qualify as a violent felony. *See Snyder*, 871 F.3d at 1129 n.4. Citing *United States v. Gonzales*, 558 F.3d 1193 (10th Cir. 2009), the Tenth Circuit explained that, prior to *Mathis*, the Wyoming statute was considered divisible, and "Wyoming state burglary convictions that involved occupied structures constituted qualifying offenses under the ACCA's enumerated crimes clause." *Snyder*, 871 F.3d at 1129 n.4. But the panel further explained that "*Gonzales* has since been abrogated by [this] Court's decision in *Mathis*." *Id.* This Court similarly noted that Tenth Circuit divisibility law was abrogated by *Mathis*. 136 S. Ct. at 2251 n.1 (citing with disfavor *United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014)). Accordingly it is clear that Mr. Murphy would not be ACCA-eligible under today's law and is serving an illegal sentence. For these reasons, the decision below is incorrect and should be reversed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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