No. __-_____

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW RICHARDSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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APPENDIX

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Case No. 17-5517

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MATTHEW GARY RICHARDSON

Petitioner - Appellant

v.

UNITED STATES OF AMERICA

Respondent - Appellee

BEFORE: COLE, Chief Circuit Judge; WHITE and BUSH, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant ,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: June 04, 2018

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0093p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MATTHEW GARY RICHARDSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-5517

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
Nos. 3:14-cr-00025-1; 3:16-cv-00398—Thomas A. Varlan, Chief District Judge.

Argued: March 7, 2018

Decided and Filed: May 15, 2018

Before: COLE, Chief Judge; WHITE and BUSH, Circuit Judges.

COUNSEL

ARGUED: Laura E. Davis, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. **ON BRIEF:** Laura E. Davis, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

HELENE N. WHITE, Circuit Judge. Petitioner Matthew Richardson appeals the district court's denial of his 28 U.S.C. § 2255 motion to set aside his sentence, challenging his

designation as an armed career criminal under 18 U.S.C. § 924(e), the Armed Career Criminal Act ("ACCA"). We **AFFIRM**.

I. BACKGROUND

In 2012, after attempting to sell a sawed-off shotgun, Richardson pleaded guilty to possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Based on Richardson's three prior Georgia burglary convictions,[1] each of which qualified as a predicate "violent felony" under the ACCA, the district court determined that Richardson was an armed career criminal and sentenced him to 180 months' imprisonment. Richardson did not appeal his sentence, but now brings this § 2255 motion alleging that in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his prior Georgia burglary convictions no longer qualify as predicate offenses under the ACCA. The district court denied the motion,[2] and this timely appeal followed.

II. THE APPLICABLE LAW

We review de novo whether Richardson's prior convictions qualify as predicate violent felonies under the ACCA. *United States v. Hockenberry*, 730 F.3d 645, 663 (6th Cir. 2013) (citation omitted). The ACCA provides for a mandatory minimum sentence of 180 months when a felon found guilty of possessing a firearm was previously convicted of at least three prior "serious drug offense[s]" or "violent felon[ies]." 18 U.S.C. § 924(e)(1). As relevant here, the ACCA defines "violent felony" to include "burglary." *Id.* § 924(e)(2)(B)(ii).

However, not every "burglary" conviction qualifies as a predicate offense under the ACCA. As the Supreme Court explained, only "generic burglary"—defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime"—qualifies as a violent felony under the enumerated-crimes clause of the ACCA. *Taylor v. United States*, 495 U.S. 575, 598 (1990). Thus, we must determine whether Richardson's three prior Georgia burglary convictions qualify as generic burglaries. To do so, we employ the "categorical" approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

[1]Richardson committed two of his burglaries in 1999 and one in 2003.

[2]The district court initially refused to grant a certificate of appealability. Upon Richardson's motion, the district court reconsidered its decision and granted his request for a certificate of appealability.

Under the categorical approach, we must determine "whether the elements of the crime of conviction sufficiently match the elements of generic burglary." *Id.* The Supreme Court has repeatedly cautioned that a court may look only at the elements of the statute of conviction and not at the underlying facts of the offense. *Taylor*, 495 U.S. at 599–602. If the statute's elements are the same as or narrower than the elements of the generic offense, the statutory offense qualifies as a predicate offense because the commission of the offense necessarily constitutes commission of the generic offense. *Id*. at 599.

This task "is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime." *Mathis*, 136 S. Ct at 2248. However, faced with an alternatively phrased statute, courts must first determine whether the statute lists elements in the alternative and thus creates a separate crime associated with each alternative element, or whether the statute creates only a single crime and "spells out various factual ways," or "means," "of committing some component of the offense." *Id.* at 2249.

As *Mathis* explained, "[e]lements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Id.* at 2248 (quotation marks omitted). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* Means, on the other hand, "are mere real-world things—extraneous to the crime's legal requirements." *Id.* "They are circumstances or events having no legal effect or consequence . . . [and] need neither be found by a jury nor admitted by a defendant." *Id.* (quotation marks and alterations omitted). As we recently explained:

> In determining whether statutory alternatives constitute elements or means, [*Mathis*] clarified that sentencing courts should look first to state law, including judicial interpretations of the criminal statute by state courts. Alternatively, the statute itself may provide the answer. A statute might explicitly identify which things must be charged (and so are elements) and which need not be (and so are means). Moreover, if statutory alternatives carry different punishments, then under *Apprendi* they must be elements. On the other hand, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission.

> State law can be expected to provide a clear answer to the elements-means dilemma in many cases, but, if it does not, a sentencing court may briefly look to the record of the prior conviction. Sentencing courts encountering this situation may take a "peek" at the record documents for the sole and limited purpose of determining whether the listed items are elements of the offense. Indictments, jury instructions, plea colloquies and plea agreements will often reflect the crime's elements and so can reveal whether a statutory list is of elements or means. If the charging documents reiterate all the terms of the law, then each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. The same is true if those documents use a single umbrella term like "premises." On the other hand, the record could indicate that the statute contains a list of distinct elements by referencing one alternative term to the exclusion of all others. Only if the record indicates that the listed items are elements, not alternative means, may the sentencing courts examine the *Shepard* documents to determine whether the crime the defendant was convicted of constituted a generic burglary. The Court cautioned, however, that such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy *Taylor*'s demand for certainty when determining whether a defendant was convicted of a generic offense.

United States v. Ritchey, 840 F.3d 310, 318 (6th Cir. 2016) (internal quotations, citations, quotation marks, and alterations omitted).

If an alternatively phrased statute sets forth alternative *elements* of an offense, the statute is divisible and courts may proceed to apply the "modified categorical" approach to identify which crime of the alternative crimes set forth in the statute was the basis of the defendant's conviction. *Mathis*, 136 S. Ct at 2248–49. The modified categorical approach permits us to look at a limited class of documents from the record of the prior conviction (*Shepard* documents) to determine which crime, with what elements, the defendant was convicted of, before comparing that crime's elements to the generic offense. *Id.*; *see Shepard v. United States*, 544 U.S. 13, 26 (2005) ("We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.").

Here, it is undisputed that the Georgia burglary statute at issue[3] criminalizes more conduct than the generic definition of burglary set forth in *Taylor* because it includes vehicles, railcars, watercraft, and aircraft in its list of locations covered by the statute. Thus, our first task is to determine whether the listed locations are alternative elements or alternative means of fulfilling an element. If the Georgia statute includes alternative locational elements, the statute is divisible and we must apply the modified categorical approach. If the statute contemplates alternative means of fulfilling the locational element, the statute is indivisible and subject only to the categorical analysis.

III. THE ELEVENTH CIRCUIT'S *GUNDY* DECISION

In *United States v. Gundy*, the Eleventh Circuit applied the principles and tools outlined in *Mathis* to the Georgia burglary statute at issue here and found the statute to be divisible. 842 F.3d 1156, 1159–70 (11th Cir. 2016).

Gundy first found that the Georgia burglary statute is distinguishable from both the Iowa burglary statute found to be indivisible by the Supreme Court in *Mathis* and the Alabama burglary statute, which the Eleventh Circuit had previously found indivisible in *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014). Both the Iowa and Alabama statutes used a single term—"occupied structure" and "building," respectively—that was then defined in a separate statutory section to include non-generic types of locations. *Gundy*, 842 F.3d at 1165–67 (citations omitted). In contrast, the *Gundy* court reasoned, "the plain text of the Georgia statute has three subsets of different locational elements, stated in the alternative and in the disjunctive." *Id.* at 1167. Second, the court addressed state caselaw and found that in Georgia "a prosecutor must select, identify, and charge the specific place or location that was burgled," "the hallmark of a divisible statute." *Id.* Third, the court relied on a Georgia Supreme Court case stating that

[3]At the time of Richardson's burglary offenses, Georgia's burglary statute provided as follows:

> A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. . . .

Ga. Code Ann. § 16-7-1(a) (1980).

the fact "that the [burglarized] vehicle was designed as a dwelling was an *essential element of the offense*." *Id.* at 1168 (quoting *DeFrancis v. Manning*, 271 S.E.2d 209, 210 (Ga. 1980)).

Having concluded that the statute is divisible, the *Gundy* court found that the state indictments, which charged the defendant in two prior cases with burglarizing a "dwelling house," and in five cases with burglarizing a "business house," "satisf[ied] *Taylor*'s demand for certainty that Gundy's convictions were for burglary of a building or other structure, which is generic burglary." *Id.* at 1170.

Judge Jill Pryor dissented, advancing four arguments. First, she would have relied on a Georgia Court of Appeals case suggesting that the type of location is not an element of Georgia burglary. *Id.* at 1172 (quoting *Lloyd v. State*, 308 S.E.2d 25, 25 (Ga. Ct. App. 1983)). Second, she looked to Georgia's model jury instructions that "list [] 'building or dwelling' as part of a single element." *Id.* at 1173. Third, she contended that the inclusion of the phrase "other such structure designed for use as the dwelling of another" in the second part of the statute's list of locations is indeterminate and precludes a finding of divisibility. *Id.* at 1172–73. Fourth, as to the "peek" at Gundy's records, she found them unavailing because indictments for five of Gundy's predicate crimes used the phrase "business house," which is not found in the statute. *Id.* at 1178.

The Eleventh Circuit declined to revisit *Gundy* en banc.[4]

IV. DISCUSSION

Because Georgia law does not clearly answer whether the locations listed in Georgia's alternatively phrased burglary statute are means or elements of the offense, we "peek" at the records of Richardson's prior state convictions, which support the conclusion that the multiple locations listed in the statute are alternative elements, rather than alternative means. We thus conclude that the statute is divisible.

[4]The Supreme Court recently denied Gundy's petition for a writ of certiorari. *Gundy v. United States*, 138 S. Ct. 66 (2017).

1. Georgia Burglary Statute's Text

The Georgia burglary statute at issue does not set out different punishments for burglarizing different types of structures, so reference to the statutory text to see whether different punishments attach to the different variations provides no help. *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.").

Further, unlike the Iowa burglary statute at issue in *Mathis* and the Tennessee aggravated burglary statue at issue in our decision in *United States v. Stitt*, 860 F.3d 854, 857 (6th Cir. 2017), Georgia's burglary statute does not use a single locational term such as "occupied structure" (Iowa Code § 713.1) or "habitation" (Tenn. Code Ann. § 39-14-403), which is then separately defined by means of "illustrative examples." Nor does Georgia's burglary statute use the broad term "includes," unlike, for instance, the Alabama statute held indivisible in *Howard*, 742 F.3d at 1348. Thus, this inquiry is also of no help; although a statute with a single locational element that is separately defined is indivisible, the absence of a single locational element with a separate definition does not mean that a statute is divisible.

2. Georgia Burglary Statute's Structure

According to *Gundy*, the burglary statute creates three distinct and exhaustive categories of locations: "(1) dwelling house, or (2) building, vehicle, railroad car, watercraft, or other such structure designed for use as a dwelling, or (3) any other building, railroad car, aircraft, or any room or any part thereof." 842 F.3d at 1165. Further, *Gundy* held that the statute's repeated use of the disjunctive "or" indicates that those specifically listed locations are alternative elements of the offense. "Each of the three subsets enumerates a finite list of specific structures in which the unlawful entry must occur to constitute the crime of burglary. In doing so, the burglary statute has multiple locational elements effectively creating several different crimes." *Id.* at 1167. Focusing on the disjunctive nature of the statute does find some support in precedent. For instance, in *Descamps*, the Supreme Court explained that a statute "stating that burglary involves entry into a building *or* an automobile" is divisible. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

However, *Gundy*'s conclusion that the statute's structure supports finding that the locations are elements is problematic. First, *Gundy*'s assertion that the statute has three subsets of different locational elements is not based on any Georgia authority (and our research reveals none). Second, even if *Gundy* is correct to rely on the disjunctive nature of the statute to divide it into three subsets, as the dissent in *Gundy* pointed out,

> *Mathis* makes clear that alternative phrasing is a necessary—but by no means sufficient—condition to read a statute as setting out alternative elements. *See* 136 S.Ct. at 2256 ("The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."). *Mathis* then lists two attributes of an alternatively phrased statute that would confirm its divisibility. First, "[i]f statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Id.* Second, "a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Id.* Neither is present in this case, however. Absent these attributes, or something equally compelling, alternate phrasing is neutral with respect to the elements-versus-means inquiry.

Gundy, 842 F.3d at 1174 (Jill Pryor, J., dissenting).

3. Georgia Caselaw

The government argues that the clearest indication that the statute contains a locational element comes from the Georgia Supreme Court in *DeFrancis v. Manning*, 246 Ga. 307 (1980). In *Manning*, the indictment charged that the defendant

> unlawfully without authority and with intent to commit a theft therein entered that certain vehicle, same being a gray Ford truck, being the property of and owned by . . . , said truck being located on 10th Avenue West in the City of Cordele, Crisp County, Georgia, at the time of said entry therein by the said accused.

Id. at 307. The Georgia Supreme Court set aside the defendant's burglary conviction because the indictment did not charge that the vehicle was "designed for use as a dwelling." *Id.* at 308. As the Georgia Supreme Court held, "that the vehicle was designed as a dwelling was an *essential element* of the offense which must be alleged." *Id.* (emphasis added).

The government reads too much into *Manning*. Again, we agree with the *Gundy* dissent:

> In [*Manning*], the Georgia Supreme Court upheld a lower court's decision overturning a defendant's conviction for burglarizing a truck. 271 S.E.2d at 210. The appellate court held the conviction was invalid because Georgia law only criminalized entering without authority "any . . . vehicle . . . designed for use as the dwelling of another," *id.* (quoting O.C.G.A. § 26-1601 (1968)), and "no proof was offered at trial that the truck was 'designed for the use as the dwelling of another.'" *Id.* For the same reason, the [*Manning*] court held that the indictment was flawed because it failed to allege that the truck was designed as a dwelling. *See id.* This omission was not error because—as the majority incorrectly surmises—Georgia burglary indictments must always include a single type of location. The question in [*Manning*] was not whether the burglary occurred in a truck versus a building, but rather whether the truck met the statute's requirement that it be designed for use as a dwelling. Thus, the indictment in [*Manning*] was flawed because it did not allege a crime at all. In other words, [*Manning*] did not bar a burglary indictment from listing "building, dwelling, truck, or railroad car designed for use as a dwelling." It merely said that an indictment must specify a location that the statute makes it a crime to enter.

Gundy, 842 F.3d at 1176–77 (Jill Pryor, J., dissenting). Stated differently, because breaking into a car not adapted for overnight accommodation is not burglary, *Manning* emphasized that to trigger the burglary statute, it was "essential" that the "adapted for overnight accommodation" language be included in the indictment and proved at trial.

Further, decisions issued after *Manning* reveal that Georgia's appellate courts have not read *Manning* to hold that a specific burglary location is an element of the offense. Notably, three years after *Manning*, the Georgia Court of Appeals held that "there are two essential elements which must be established by the State: 1) lack of authority to enter the dwelling or building; 2) intent to commit a felony or theft." *Lloyd v. State*, 308 S.E.2d 25, 25 (Ga. Ct. App. 1983).

But *Lloyd* too does not resolve the threshold elements/means inquiry. Despite *Lloyd*'s statement about the two elements of burglary, *Lloyd* "had nothing to do with the locational element" at issue here, *Gundy*, 842 F.3d at 1169, as the types of places that could be burglarized were not at issue in *Lloyd*. The sole issue in *Lloyd* was whether the evidence was sufficient to prove "lack of authority on the defendant's part to enter the building." 308 S.E.2d at 25. Thus,

although *Manning* does not "definitively answer[] the [threshold elements-versus-means] question," *Mathis*, 136 S. Ct. at 2256, neither does *Lloyd*.

Richardson also relies on *Weeks v. State*, 616 S.E.2d 852 (Ga. Ct. App. 2005), and *Sanders v. State*, 667 S.E.2d 396 (Ga. Ct. App. 2008), arguing that in *Weeks*

> [t]he indictment charged that [the defendant] entered the "dwelling house of another: to wit, Anthony Sexton." The proof at trial, however, showed that the house was under construction. The appellate court agreed that the incomplete building was not a dwelling, but found that "Week's [sic] argument is not a challenge to the sufficiency of the evidence, for the evidence sufficed to show that this was a building under the statute and therefore could be burglarized." In holding that proof that the structure was a "building," which was not the type of structure alleged in the indictment, did not raise a sufficiency argument, the court demonstrated that the type of structure was not an essential element of the offense. The jury need not find a specific type of structure - any structure would suffice. If the type of structure was an essential element of the offense, failure of proof on that issue would have sustained a sufficiency challenge because it would have automatically affected the defendant's substantial rights.
>
> * * *
>
> [*Sanders*] confronted the same issue . . . . Sanders was charged with entering "the dwelling house of another, to wit: Aaron Fox." The evidence at trial, however, did not establish that the building was a dwelling. Nonetheless, because the evidence was sufficient to find the place entered was a building, the court found that the evidence was sufficient to uphold the burglary conviction. Thus, under Georgia law, the type of structure need not be charged - and if one type of structure was actually charged, proof of a completely different type of structure is sufficient to uphold a finding of guilt - clearly establishing that the type of structure is not an element of the offense.

(Appellant's Br. at 12–13 (internal citations omitted).)

Richardson's assertion that both *Weeks* and *Sanders* "made clear that the type of structure is not an element of burglary" (*Id.* at 12) is unconvincing because neither *Weeks* nor *Sanders* actually held that the specific type of location is not an essential element of burglary. In each case, the defendants merely argued that "the evidence fatally varied from the allegations of the indictment." *Weeks*, 616 S.E.2d at 854; *see Sanders*, 667 S.E.2d at 399. Under Georgia law, whether a variance is fatal turns on whether "(1) . . . the accused [was] definitely informed as to the charges against him so that he [was] able to present his defense, and (2) [is] protected against

another prosecution for the same offense." *Battles v. State*, 420 S.E.2d 303, 305 (Ga. 1992). In both *Weeks* and *Sanders*, the appellate court held that the variances were not fatal because the description of the burgled structure in the indictment was sufficient and did not "impede[] [the defendant's] ability to present a subsequent defense or surprise him at trial, and [ensured that] he cannot be subjected to a subsequent prosecution for the burglary of the building in question." *Weeks*, 616 S.E.2d at 855. Thus, both *Weeks* and *Sanders* are more properly characterized as fatal-variance cases that, contrary to Richardson's assertions, do not definitively demonstrate that the locations listed in the Georgia burglary statute are alternative means of satisfying a single element.

Further, as the *Gundy* majority and the government here point out, the Georgia Court of Appeals has repeatedly held that "where the defendant is charged with burglary, the indictment must specify the location of the burglary," *Morris v. State*, 303 S.E.2d 492, 494 (Ga. Ct. App. 1983), and the prosecution must "prove the specific location of a burglary in order to obtain a conviction." *State v. Ramos*, 243 S.E.2d 693, 694 (Ga. Ct. App. 1978). Indeed, in every Georgia burglary case cited by Richardson in his brief, the indictment specified the particular type of location burglarized. *See Sanders*, 667 S.E.2d at 399 (a "dwelling house"); *Weeks*, 616 S.E.2d at 853 (same).[5] As *Gundy* held,

> [t]he U.S. Supreme Court has told us that "[a] prosecutor charging a violation of a divisible statute must generally select the relevant element from the list of alternatives." *Descamps*, 570 U.S. at ——, 133 S.Ct. at 2290. That the Georgia prosecutor must select and identify the locational element of the place burgled—whether the place burgled was a dwelling, building, railroad car, vehicle, or watercraft—is the hallmark of a divisible statute.

842 F.3d at 1167. However, the Georgia cases addressing indictment requirements take us only so far; they do not definitively establish that the specified burglary locations are alternative elements of the offense. The cases do not address the elements of the burglary statute; rather, they deal with notice to the accused and double jeopardy. As the *Gundy* dissent aptly observed,

[5]It is also notable that not one of the Georgia cases cited by Richardson holds that an indictment may charge a generic burglary (e.g., unauthorized entry into a "building or structure") but that a jury may instead find a defendant guilty of a non-generic burglary (e.g., unauthorized entry into an aircraft).

> the [*Gundy*] majority misapprehends the purpose of requiring the burglary's location to be included in indictments. The majority speculates that the multiple types of locations listed in the Georgia burglary statute must be "why under Georgia law a prosecutor must select, identify, and charge the specific place or location that was burgled." . . . This speculation lacks support. Rather, as a case the majority cites makes clear, an indictment must include the location burglarized in order "to give the defendant ample opportunity to prepare a defense." *Morris*, 303 S.E.2d at 494. The many indictment cases on which the majority relies never considered whether the types of locations listed in Georgia's burglary statute are alternative elements or means of committing the crime because these cases were concerned only with the need to "inform the accused as to the charges against him so that he may present his defense and not . . . be taken by surprise" and to "protect the accused against another prosecution for the same offense." *Smarr v. State*, 317 Ga. App. 584, 732 S.E.2d 110, 115 (2012).

842 F.3d at 1176 (Jill Pryor, J., dissenting).

Finally, Richardson relies on Georgia's pattern jury instructions. He argues that because the instructions refer to the burglarized location only as "any building or dwelling" without listing the other locations enumerated in the statute (such as "aircraft"), the instructions support the conclusion that the type of location is not an element of burglary. (Appellant's Br. at 15–16 (citing Ga. Suggested Pattern Jury Instr., Vol. II, Crim. §§ 2.62.10, 2.62.20 [hereinafter Ga. Crim. Jury Instr.]).) Richardson also contrasts burglary's intent element with the locational list. Because there are two types of intent (to commit theft and to commit a felony), Georgia has two sets of jury instructions for burglary. Richardson thus surmises that the lack of separate instructions as to each location enumerated in the burglary statute indicates that location is not a statutory element.

However, the proposed jury instructions also do not resolve the elements/means inquiry. First, it appears that the phrase "any building or dwelling" was intended only as a placeholder; as the instructions direct, a trial judge should "[c]harge only the appropriate language" from the recommended instruction and "adapt parentheticals to the indictment and evidence." Ga. Crim. Jury Instr., Preamble to § 2.62.10. And the requirement that the instructions be modified to comport with the indictment is well-settled in Georgia. *See, e.g.*, *Childs v. State*, 357 S.E.2d 48, 58 (Ga. 1987) (stating that it "is error to charge the jury that a crime may be committed by either

of two methods, when the indictment charges it was committed by one specific method") (internal quotations marks, alterations, and citation omitted).

Second, although the relevant language of the burglary statute did not change from the pre-July-2012 version to the 2012-2017 version,[6] the language of the corresponding jury instructions did.[7] The jury instructions now list in parentheses each location enumerated in the statute. Thus, we would have to conclude that the statute is indivisible under one set of jury instructions (because, as Richardson argues, the instructions include the phrase "any building or dwelling" instead of the full list of locations) but divisible under a later version of jury instructions (because the instructions now include the full list of locations), even though the relevant language in the underlying burglary statute remained unchanged. Thus, Georgia's pattern jury instructions are also of little help.

4. Georgia Law Fails to Provide a Clear Answer

Richardson and the government, as well as the majority and dissent in *Gundy*, present colorable arguments and reasonable inferences. However, neither side has established its position with certainty. Unlike the Iowa burglary statute at issue in *Mathis*, which relied on a clear statement from the Iowa Supreme Court that the premises listed in the statute were "alternative method[s]" of satisfying the locational element, *Mathis*, 136 S. Ct. at 2256, we do not have the benefit of such a clear pronouncement from Georgia's highest court.

Although the parties' arguments do not definitively answer the threshold elements/means inquiry, they do establish that Georgia's burglary statute and the law interpreting it are ambiguous as to whether the different types of listed locations are elements or means of committing the offense. This is not surprising; "the divergence of outcomes after *Mathis* suggests that the 'elements or means' inquiry is not quite as easy as the Supreme Court thought, not the least because state legislatures and state courts do not draft their laws and craft their

[6] *Compare* Ga. Code Ann. § 16-7-1 (1980) *with* Ga. Code Ann. § 16-7-1 (2012).

[7] *Compare* Ga. Crim. Jury Instr. § 2.62.10 *with* Ga. Crim. Jury Instr. § 2.62.11.

decisions with this particular distinction in mind." *United States v. Steiner*, 847 F.3d 103, 120 (3d Cir. 2017).[8]

Here, even the most persuasive arguments offered by each side do not "definitively" answer the threshold question. *Mathis*, 136, S.Ct. at 2256. We disagree with the *Gundy* majority that the burglary statute's text and structure support the conclusion that the locations listed in the statute are elements rather than means. But we also disagree with the *Gundy* dissent that Georgia "case law *unambiguously* defines the elements of the crime of burglary, and the different types of locations that can be burglarized are not separate elements." 842 F.3d at 1171 (emphasis added).

Thus, because Georgia law fails to provide a clear answer, a *Mathis* "peek" at the records of Richardson's three Georgia burglaries is necessary.

5. *Mathis* "Peek"

As the *Mathis* Court explained, "if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself." 136, S.Ct. at 2256. The Court cautioned that this "peek" at the record documents "is for the sole and limited purpose of determining whether the listed items are elements of the offense." *Id.* at 2256–57 (quotation marks and alterations omitted). The Court also gave contrasting examples of how to employ the "peek" to answer the elements/means inquiry.

> Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle"—thus reiterating all the terms of Iowa's law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate

[8] In his dissent in *Mathis*, Justice Breyer criticized the elements/means inquiry, predicting it would "produce a time-consuming legal tangle" and prove to be "not practical" in part because "there are very few States where one can find authoritative judicial opinions that decide the means/element question." *Mathis*, 136 S. Ct. at 2263–64 (Breyer, J., dissenting). Justice Alito, also dissenting in *Mathis*, was similarly concerned that "[t]he Court's approach calls for sentencing judges to delve into pointless abstract questions" and that lower courts would struggle to apply the means-element distinction. *Id.* at 2268 (Alito, J., dissenting); *see also id.* at 2264 ("Because of the ever-morphing analysis and the increasingly blurred articulation of applicable standards, [lower courts] are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it.") (Breyer, J., dissenting) (quoting *Omargharib v. Holder*, 775 F.3d 192, 200 (4th Cir. 2014) (Niemeyer, J., concurring)).

> to prevail. *See Descamps*, 570 U.S., at ——, 133 S.Ct., at 2290. Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy "*Taylor*'s demand for certainty" when determining whether a defendant was convicted of a generic offense. *Shepard*, 544 U.S., at 21, 125 S.Ct. 1254. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.

Mathis, 136 S. Ct. at 2257. Here, the language in Richardson's indictments[9]—the only available record documents—"satisf[ies] *Taylor*'s demand for certainty when determining whether a defendant was convicted of a generic offense." *Id.* at 2257 (internal quotation marks omitted). Richardson's burglary indictments charge him with burglarizing "the dwelling house of another," (R. 35-1, PID 135), "a building, to wit: [a café,]" (*id.* at 139), and "the dwelling house of another," (*id.* at 141). Each indictment references only one of the several alternative locations listed in Georgia's burglary statute. This supports the government's argument (and *Gundy*'s holding) that the alternative locations are elements and the statute is divisible as to the locations that can be burglarized.[10]

Having concluded that Georgia's burglary statute is divisible, we must determine whether Richardson's three prior Georgia burglaries are generic under the ACCA. In doing so, we employ the modified categorical approach. Here, Richardson's state court indictments make clear that his burglary convictions involved three elements: (1) an unlawful entry (2) into a dwelling house or building (3) with intent to commit a crime therein. These elements substantially conform to the generic definition of burglary announced by the Supreme Court.

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[9]The first 1999 indictment charged that Richardson "did without authority and with the intent to commit a felony or theft therein enter the dwelling house of another . . . ." (R. 35-1, PID 135.) The second 1999 indictment charged that Richardson "did without authority and with the intent to commit a felony, to wit: theft, therein entered a building, to wit: [a café.]" (*Id.* at 139.) The 2003 indictment charged that Richardson "did, without authority and with the intent to commit a theft therein, enter and remain within the dwelling house of another . . . ." (*Id.* at 141.)

[10]Richardson's only argument here is that "[a] *Mathis* 'peek' invites unlawful judicial factfinding" and "invites the very collapse of the distinction between the categorical and modified categorical approach cautioned against in *Descamps*." (Reply Br. at 12.) Having engaged in the analysis here, we understand the practical reality of Richardson's argument. Still, that argument demonstrates disagreement with *Mathis* and the Supreme Court's direction to peek at the records of a defendant's prior convictions in search of clarity. But *Mathis* is the law.

See Taylor, 495 U.S. at 599, 602 (stating that generic burglary is an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime").

Therefore, Richardson's prior Georgia burglary convictions at issue qualify as violent felonies under the ACCA's enumerated-crimes clause, and the district court did not err in sentencing Richardson as an armed career criminal.

V. CONCLUSION

We **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

MATTHEW GARY RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 3:14-CR-25-TAV-CCS-1
	)	3:16-CV-398-TAV
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

On June 24, 2016, Petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 32]. He based the request on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*].[1] The government filed a response in opposition to collateral relief [Doc. 35], Petitioner replied in turn [Doc. 36], and this Court denied the petition in a Memorandum Opinion and Judgment Order entered on December 29, 2016 [Docs. 39, 41]. Specially, it concluded that at least three of Petitioner's prior Georgia burglary convictions remained violent felonies under the ACCA enumerated-offense clause after the *Johnson* decision and *Mathis v. United States*, 136 S. Ct. 2243 (2016), and denied a certificate of appealability (COA) [Doc. 39 pp. 3–10]. Before the Court is Petitioner's motion to alter or amend its prior ruling pursuant to Federal Rule of Civil Procedure 59(e) [Doc. 41].

[1] On February 11, 2016, the Court appointed Federal Defender Services of Eastern Tennessee ("FDSET") for the limited purpose of reviewing the case to determine whether Petitioner is eligible for collateral relief based on the *Johnson* decision. *See* E.D. Tenn. SO-16-02 (Feb. 11, 2016). Consistent with that appointment, FDSET submitted both the original petition for relief and the instant motion to reconsider denial of that petition [Docs. 32, 41].

I. STANDARD OF REVIEW

A motion to alter or amend judgment under Rule 59(e) may be granted for a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). It is improper to use the motion "to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008) (citation omitted). The Court's discretion to grant relief must be used sparingly, as revising a final judgment is an extraordinary remedy. *Ira Green, Inc. v. Military Sales & Service Co.*, 775 F.3d 12, 18 (1st Cir. 2014).

II. REQUEST FOR RECONSIDERATION

Petitioner raises two arguments in support of his request that the Court alter or amend its December 29, 2016 Memorandum Opinion and Judgment Order. In the first, he claims that the Court erred when it held that the Georgia burglary statute underlying his convictions is divisible [Doc. 41 pp. 2–3]. In the second, he argues that the Court erred when it denied a COA because, at minimum, reasonable jurists could disagree over the propriety of that conclusion [*Id.* at 3–6].

A. Reconsideration of Entitlement to Relief

Petitioner argues that the Court erred when it found Georgia Code Annotated § 16-7-1 to be a divisible statute and concluded that at least three of Petitioner's convictions thereunder qualified as predicate offenses under the ACCA enumerated-offense clause [Doc.

41].[2] Specifically, he suggests that the Court failed to adequately "distinguish [between] the use of a particular location as a requirement for sufficient pleading in an indictment from its use as an element of a crime" or take into account "the Georgia Pattern Jury Instructions" submitted in conjunction with the petition [*Id.* at 2 (noting that the instructions only require that jurors agree the defendant entered a "building or dwelling place of another" and thus the enumerated list of locations contained in the Georgia burglary statute constitute means of committing that offense)].

After concluding that Georgia Code Annotated § 16-7-1 is a non-generic provision because some forms of the offense qualify as predicate offenses under § 924(e) and others do not, the Court explained that the propriety of Petitioner's ACCA enhancement depended on

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[2] The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1) (emphasis added). The provision defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-physical-force clause"); (2) "is burglary, arson, or extortion, involves the use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). Only the third portion of the above definition—the residual clause—was held to be unconstitutionally vague by the Supreme Court in *Johnson*. 135 S. Ct. at 2563. The Court went on to make clear, however, that its decision did not call into question the remainder of the ACCA's definition of violent felony—the use-of-physical-force and enumerated-offense clauses. *Id.*; *United States v. Priddy*, 808 F.3d 676, 682–83 (6th Cir. 2015).

In *Mathis*, the Supreme Court held that: (1) a prior conviction does not qualify as a generic form of a predicate violent felony for purposes of the ACCA if an element of the crime of conviction is made broader than an element of the generic offense by way of an enumerated list of alternative factual means for satisfaction of the former; and (2) Iowa's burglary statute—which defines "structure" to include any building, structure, [or] land, water, or air vehicle"—had a broader locational component than generic burglary. 136 S. Ct. 2247–48, 53–54. Because the "structure" element of Iowa's burglary statute was broader than the parallel element of generic burglary, the Court concluded that the petitioner's prior convictions were incapable of supporting enhancement under the enumerated offense clause. *Id.* at 2257.

whether or not the burglary statue is divisible or indivisible after the *Mathis* decision [Doc. 39 pp. 4–6]. It went on to explain that any such determination required consideration of: (1) the text of the statute; (2) any state court decisions interpreting that statute; and (3) where "state law fails to provide clear answers, . . . the record of a prior conviction," i.e., charging documents and jury instructions, for the "limited purpose" of distinguishing between means and elements [*Id.* at 6]. The Court cited the following as support for its conclusion that the provision at issue "contain[ed] several alterative sets of elements as opposed to alternative means of satisfying a single indivisible set of elements," i.e., is a divisible statute capable of examination under the modified categorical approach:

> Unlike the Iowa statute at issue in *Mathis*, Georgia Code Annotated § 16-7-1 identifies three distinct categories of location that are subject to unlawful entry—(1) the dwelling house of another, (2) any other building, vehicle, railroad car, watercraft, aircraft, or other structure designed for use as the dwelling of another; or (3) any other building, railroad car, aircraft. The Supreme Court made clear in the *Descamps* decision that the use of "or" to separate clauses within a provision is a strong indicator that each clause represents an alternative element for which satisfaction equates to an independent criminal offense. *See Descamps*, 133 S. Ct. at 2281 (explaining that an example of a divisible statute is one "stating that burglary involves entry into a building or an automobile"). While the foregoing weights strongly in favor of finding that the Georgia burglary statute is divisible, the fact that Georgia law requires prosecutors select, identify, and charge the specific location burgled, *see, e.g.*, *Morris v. State*, 303 S.E.2d 492, 494 (Ga. App. 1983) (stating that "where the defendant is charged with burglary, the indictment must specify the location of the burglary" and concluding indictment was sufficient where it charged a building," identified as "the Financial Aid Office and Alumni Office, located at For Valley State College"); *State v. Ramos*, 243 S.E.2d 693, 693 (Ga. App. 1978) (stating that it is not necessary to prove "the specific place" to obtain a theft-by-taking conviction, but it is necessary to prove the "specific location" to obtain a burglary conviction): *Chester v. State*, 140 S.E.2d 52, 53 (Ga. App. 1964) ("It must be alleged and proven in an indictment for burglary that there was a breaking and entering of one of the classes of buildings set out in the statute."), and fact that the Georgia Supreme Court has referred to the location of the crime as "an

> essential element of the offense," *DeFrancis v. Manning*, 271 S.E.2d 209 (1980), forecloses any doubt.

[*Id.* at 7–8]. Because his state-court indictments indicate that at least three of Petitioner's prior convictions involved violations meeting the generic definition of burglary, the Court found that Petitioner remained an armed career criminal after the *Johnson* decision.[3]

The Court disagrees that it afforded undue weight to the fact that Georgia law requires that location burglarized be included in every burglary indictment. As an initial matter, the United States Supreme Court stated in the *Mathis* decision that indictments are a valid source of information when attempting to determine whether a statutory list of alternatives contains elements or means. Specifically, the Court explained that "[a] prosecutor charging a violation of a divisible statute must generally select the relevant element form the list of alternatives." *Descamps*, 133 S. Ct. at 2290. Thus, the fact that prosecutors in Georgia "must select and identify the locational element of the placed burgled—whether that place be a dwelling, building, railroad car, vehicle, or watercraft—is the hallmark of a divisible statute." *Creekmore v. United States*, No. 1:14-cv-8018-SLB, 2017 WL 386660, at *7 (N.D. Ala. Jan. 27, 2017). Even if this Court were to disregard the information contained within indictments as merely a matter of providing sufficient notice, that would not change the fact that the plain language of Georgia Code Annotated § 16-7-1 points toward divisibility, *see id.* at 2281 (explaining locations listed in the disjunctive, i.e., separated by "or," are typically

[3] For purposes of § 924(e), the United States Supreme Court defines generic burglary as any conviction, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990).

indicative of a divisible provision), or the fact that the highest authority on Georgia law has characterized the location burglarized as "an essential element of the offense," *DeFrancis*, 271 S.E.2d at 308; *accord United States v. Grundy*, 842 F.3d 1156, 1166–68 (11th Cir. 2016) (concluding that Georgia Code Annotated § 16-7-1 is a divisible statute); *United States v. Martinez-Garcia*, 625 F.3d 196, 198 (5th Cir. 2010) (same).

To the extent that Petitioner cites the dissent to the *Grundy* opinion in support of his argument that location burglarized must be plead in the indictment but not necessarily agreed upon by the jury and, as a result, cannot be treated as an "element" for purposes of divisibility analysis, the Court remains unpersuaded. While it is true that the Georgia Court of Appeals has characterized the "two essential elements" of Georgia burglary as "lack of authority to enter the dwelling or building . . . [and] intent to commit a felony or theft," *Lloyd v. State*, 308 S.E.2d 25, 25 (Ga. App. 1983)), it did so in an opinion that was focused solely on whether or not the prosecution had proven "lack of authority on the defendant's part to enter the building," *id.* at 25. The reliability of the statement is further brought into question by the fact that the same intermediate appellate court has said that "it must be alleged and *proved* . . . that there was a breaking and entering of one of the classes of buildings set out in the statute," *Chester v. State*, 140 S.E.2d 52, 53 (Ga. App. 1964) (emphasis added), and that "it is necessary to *prove* the specific location of a burglary in order to obtain a conviction," *State v. Ramos*, 243 S.E.2d 693, 693 (Ga. App. 1978) (emphasis added). These latter two articulations combined with the Georgia Supreme Court's unambiguous statement that location burglarized is an essential element of Georgia burglary convince the Court that

Georgia Code Annotated § 16-7-1 contains alternative elements as opposed to alternative means of committing a single crime.

To the extent that Petitioner cites *Weeks v. State*, 616 S.E.2d 852 (Ga. App. 2005), and *Davis v. State*, 706 S.E.2d 710 (Ga. App. 2011)—both of which found that variations between the specific location alleged in the indictment and proof ultimately presented at trial did not prevent the jury from returning a conviction, as evidence that the "jury need not identify or agree upon a specific type of structure but, rather, any structure under the statute (generic or non-generic alike) will suffice" [Doc. 41 p. 3 n. 2], the Court disagrees with that interpretation for two reasons.

First, the Court rejects any suggestion that the *Weeks* and *Davis* decisions make it possible for someone charged with a generic version of burglary—burglary of a dwelling—to be convicted of a non-generic version of that same offense—burglary of a watercraft. Such was not the case in either of those cases. Further, Petitioner has not cited and this Court is unaware of any other case in which an individual charged with generic burglary was convicted of a non-generic crime.

Second, in Georgia, the inquiry where there is a variance between an indictment's allegations and the proof adduced at trial is whether "(1) . . . the accused [is] definitely informed as to the charges against him, so that he is able to present his defense, and (2) . . . protected against another prosecution for the same offense." *Battles v. State*, 420 S.E.2d 303, 305 (Ga. 1992). In the *Weeks* decision, the court found that the variance between the location alleged and proven at trial was not fatal because the indictment still provided adequate notice:

> The allegations correctly described the structure being unlawfully entered as belonging to Anthony Sexton and as being adjacent to other property having the address of 2479 Mill Creek Roach in Whitfield County. The indictment further identified the date of the attempted burglary. Specifically describing the structure's location and owner and the date of the burglary, the allegations definitely informed weeks as to the charges against him so as to enable him to present his defense and not be taken by surprise. The allegations were further adequate to protect weeks against another prosecution of the same offense.

Weeks, 616 S.E.2d at 854–55. The court expressly rejected the defendant's claim that the prosecution had failed to prove he committed the burglary, explaining that "the evidence sufficed to show that [he entered] a building under the statute." *Id.* at 853–54. Similarly, in the *Davis* decision, the court held that the defendant had sufficient notice to defend himself:

> The indictment's description of the structure as a dwelling house as opposed to a building did not mislead Davis in such a manner that impeded his ability to present a subsequent defense or surprise him at trial, and he cannot be subjected to a subsequent prosecution for the burglary of a building in question. Thus, Davis has failed to show that any variance was fatal.

Davis, 706 S.E.2d at 717. Notably, neither the *Weeks* nor *Davis* decisions held that location burglarized is not an essential element of Georgia burglary. *Cf. Holder v. State*, 529 S.E.2d 907, 909–10 (Ga. App. 2000) (explaining that the variance between indictment and proof at trial was not fatal because "[t]he date on which the checks were delivered is not an essential element of the offense of deposit account fraud); *Kelly v. State*, 508 S.E.2d 228, 230 (Ga. App. 1998) ("[T]he identity of the person alleged to have been robbed is not an essential element of the crime so as to create a fatal variance."); *Abercrombie v. State*, 243 S.E.2d 567, 568–69 (Ga. App. 1978) (explaining that the variance between indictment and proof at trial was not fatal because "proof of whom a stolen article was received is not an essential element of the crime of receiving stolen property" and "[t]he state's evidence adequately proved all the essential elements of the crime").

Petitioner next argues that the Court failed to analyze the Georgia Pattern Jury Instructions attached to his petition for relief [Doc. 41 pp. 2–3], but that omission was intentional. While Pattern Jury Instructions can be helpful where the text of a statute and state court decision interpreting the same are ambiguous, courts need not consider them where the state of the law is clear. In other words, because Pattern Jury Instructions do not have the force of law, they cannot be used to create ambiguity where none otherwise exists. Here, the text of Georgia Code Annotated § 61-7-1 and the state supreme court and intermediate court decisions interpreting that provision make it sufficiently clear that the disjunctive list of locations constitute distinct elements.

For the reasons outlined above and in this Court's original Memorandum Opinion [*see generally* Doc. 39], the Court finds that at least three of Petitioner's prior convictions qualify as predicate offenses independent of the now-defunct ACCA residual provision. As such, Petitioner has failed to demonstrate that his sentence exists in contravention of the laws of the United States.

B. Reconsideration of COA

Section 2253 permits issuance of a certificate of appealability ("COA") where "the applicant has made a substantial showing of the denial of a constitutional right" and requires that any certificate issued "indicate which specific issue or issues satisfy [that standard]." 28 U.S.C. §§ 2253(c)(2), (3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253 is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *see*

also Cox v. United States, No. 1:00-cv-176, 2007 WL 1319270, at *1 (E.D. Tenn. May 4, 2007) (denying request for COA).

In support for his argument that reasonable jurists could disagree over the propriety of this Court's conclusion and corresponding request that the Court reconsider its *sua sponte* denial of a COA, Petitioner notes the following:

> [O]ther jurists of reason have already found [that] this type of claim has merit. In fact, the very case [on which] this Court relies to deny [Petitioner's] request for either a stay or a certificate of appealability is a split decision of a three-judge panel with a vigorous dissent. The heart of the dissent, in fact, is the very issue raised [in Petitioner's request for collateral relief].

[Doc. 41 p. 5]. The decision to which Petitioner refers is the Eleventh Circuit's decision in *United States v. Grundy*—where the majority held that Georgia Code Annotated § 16-7-1 was overly broad but divisible, *Grundy*, 842 F.3d at 1159–1170. Petitioner's point regarding Judge Pryor's detailed dissent in that case is well taken. *Id.* at 1170–80 (J. Pryor, dissenting) (finding the provision overly broad and indivisible based on nearly identical arguments).

While this Court remains confident in the merits of its decision to deny Petitioner's request for collateral relief, the reasonableness of the *Grundy* dissent and fact that the Sixth Circuit has not yet had an opportunity to speak on the issue lead this Court to conclude that it erred when it chose to *sua sponte* deny a certificate of appealability. Because the Court recognizes that reasonable jurists could find its assessment of Petitioner's claim debatable, a limited COA will issue.

III. CONCLUSION

For the reasons discussed above, Petitioner's request that the Court alter or amend its Memorandum Opinion and Judgment Order [Doc. 41] is **DENIED** so far as it seeks reconsideration of the Court's denial of collateral relief, but **GRANTED** so far as it seeks reconsideration of the Court's denial of a COA; the request for issuance of a COA is **GRANTED**.

IT IS SO ORDERED.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

MATTHEW GARY RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos.: 3:14-CR-25-TAV-CCS-1
	)	3:16-CV-398-TAV
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Before the Court is Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 32]. Petitioner bases his request for relief on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*]. The United States filed a response in opposition to relief on August 24, 2016 [Doc. 35]; Petitioner replied in turn on September 12, 2016 [Doc. 36]. Included in Petitioner's reply to the United States' response is a request that this Court defer ruling on the instant petition pending the Eleventh Circuit's decision in *United States v. Antonio Heard*, No. 15-10612-BB (11th Cir. 2016) [*Id.*]. For the reasons that follow, Petitioner's request for deferral will be **DENIED** and § 2255 motion will be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

In 2014, Petitioner pled guilty to, and was subsequently convicted of, possessing a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g) [Doc. 27]. Based on three prior Georgia burglary convictions—a June 16, 1999 conviction, an August 31, 1999 conviction, and a June 23, 2003 conviction, the United States Probation Office deemed

Petitioner to be an armed career criminal subject to the ACCA's enhanced fifteen-year mandatory minimum sentence [PSR ¶¶ 21, 28, 29, 37]. In accordance with that designation, this Court sentenced Petitioner to 180 months' incarceration followed by five years' supervised release on April 29, 2015 [Doc. 27]. No direct appeal was taken.

More than thirteen months later—on June 24, 2016—Petitioner filed the instant timely petition challenging the propriety of his ACCA designation in light of the *Johnson* decision [Doc. 32 (arguing that he no longer has sufficient predicate offenses for ACCA enhancement)].

II. TIMELINESS OF PETITION

Section 2255(f) places a one-year statute of limitations on all petitions for collateral relief under § 2255 running from either: (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f). The petition's reliance on *Johnson* triggers the renewed one-year limitations period under subsection (f)(3). *See Welch v. United States*, 135 S. Ct. 1257, 1265 (2016) ("*Johnson* is . . . a substantive decision and so has retroactive effect . . . in cases on collateral review."); *In re Windy Watkins*, 810 F.3d 375, 380–81 (6th Cir. 2015) (finding *Johnson* constitutes a new substantive rule of constitutional law made retroactively applicable on collateral review and thus triggers § 2255(h)(2)'s requirement for

certification of a second or successive petition). The renewed period began to run on June 26, 2015 and, as a result, the petition falls safely within the window for requesting relief [Doc. 32].

III. STANDARD OF REVIEW

The relief authorized by 28 U.S.C. § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

IV. ANALYSIS

The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1) (emphasis added). The provision defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-physical-force clause"); (2) "is burglary, arson, or extortion, involves the use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). Only the third portion of the above definition—the residual clause—was held to be unconstitutionally vague by

the Supreme Court in *Johnson*. 135 S. Ct. at 2563. The Court went on to make clear, however, that its decision did not call into question the remainder of the ACCA's definition of violent felony—the use-of-physical-force and enumerated-offense clauses. *Id.*; *United States v. Priddy*, 808 F.3d 676, 682–83 (6th Cir. 2015).

For purposes of the instant case, the validity of Petitioner's categorization as an armed career criminal depends on whether his three Georgia burglary convictions remain violent felonies after the *Johnson* decision, i.e., under the ACCA use-of-physical-force or enumerated-offense clauses. At the time Petitioner committed the offenses, the relevant Georgia statute read:

> [a] person commits the offense of burglary when, [(1)] without authority and [(2)] with the intent to commit a felony or theft therein, [(3)] he enters or remains [(4)] within the dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other structure designed for use as at the dwelling of another, or enters or remains within any other building, railroad car, aircraft, or any room or part thereof.

Ga. Code Ann. § 16-7-1 (1980). The same provision defined "railroad car" as trailers on flatcars, containers on flatcars, trailer on railroad property, or containers on railroad property. *Id.* Because the offense can be committed without the use of violent physical force, Petitioner's entitlement to collateral relief depends on whether or not his Georgia burglary convictions align with the generic definition announced in *Taylor v. United States*, 495 U.S. 575 (1990), and thus falls within the scope of the ACCA enumerated-offense clause. *See, e.g.*, *United States v. Ozier*, 796 F.3d 597, 604 (6th Cir. 2015) (rejecting challenge where the petitioner's prior convictions qualified as predicate offenses independent of the now-defunct residual clause), *overturned on other grounds by Mathis v. United States*, 136 S. Ct. 2246, 2251 n.1 (2016).

To determine whether Petitioner's violations of Georgia Code Annotated § 16-7-1 remain violent felonies under the enumerated-offense clause, the Court needs to identify the precise

crimes of conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013).[1] To do so, the Court must employ a "categorical approach," under which it looks "only to the statutory definitions—elements—of a defendant's prior offense, and not to the particular facts underlying [each individual] conviction[]." *Id.* at 2283 (internal quotations omitted). If the statute categorically aligns with the generic version of the offense, the inquiry is over. If, however, the statute criminalizes conduct in excess of that covered by the enumerated-offense clause, it becomes necessary to determine whether the statute is divisible or indivisible. A divisible statute is one that comprises multiple crimes, alternative sets of elements. *Id.* at 2281. An indivisible statute is one that contains a single crime, lone set of indivisible elements. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). When faced with a divisible statute, the Court resorts to the "modified categorical approach," i.e., consults "a limited class of documents, such as indictments and jury instructions, to determine which alternative [set of elements] formed the basis of the defendant's prior conviction." *Id.* at 2281. Because the categorical and modified approaches are concerned with elements and not "facts underlying [any particular] conviction," *Id.* at 2285, the Court is prohibited from using either approach to distinguish between alternative means for satisfying a single indivisible element. *Mathis*, 136 S. Ct. at 2253–54. As such, it is important that the Court distinguish between divisible provisions to which the modified approach

[1] The Supreme Court clarified in *Descamps* how sentencing courts should identify a defendant's offense when the prior conviction involved the violation of a "divisible" statute—one which "comprises multiple, alternative versions of the same crime." 133 S. Ct. at 2284. Specifically, the Court explained that the sentencing court should employ a "modified categorical approach" and "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* at 2281. The decision made clear that "the job . . . of the modified approach [was only] to identify, from among several alternatives, the crime of conviction so that the court can" determine whether that variant of the offense qualified as a violent felony under the ACCA's definition of violent felony. *Id.* at 2285.

can be applied and indivisible provisions to which it cannot. Convictions under an overly broad indivisible provision are incapable of serving as a predicate offense for ACCA enhancement.

For purposes of § 924(e), the Supreme Court has defined generic burglary as any conviction, "regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. The inclusion of vehicles, railcars, watercraft, and aircraft within the list of locations capable of being burglarized expands the Georgia burglary provision beyond the scope of *Taylor*'s definition. *See, e.g.*, *United States v. Bennett*, 472 F.3d 825, 832 (11th Cir. 2006) (noting that Georgia Code Annotated § 16-7-1 criminalized entry into a broad category of vehicles, railroad cars, watercraft, and aircraft and, as a result, was not fully subsumed within the scope of *Taylor*'s definition of generic burglary). As such, Petitioner's continued designation as an armed career criminal depends on whether his statute of conviction is divisible or indivisible.

To determine whether the list of locations set out in Georgia Code Annotated § 16-7-1 constitute alternative elements for commission of multiple divisible crimes or alternative means of satisfying a single indivisible crime, the Court must consider: (1) the text of the statute; (2) any state court decisions interpreting that statute; and (3) where "state law fails to provide clear answers, . . . the record of a prior conviction," i.e., charging documents and jury instructions, for the "limited purpose" of distinguishing between means and elements. *Id.* at 2256–57. With regard to the third factor, the Supreme Court has provided the following:

> Suppose, for example, that one count of an indictment and correlative jury instructions . . . use a single umbrella term like "premises" . . . the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statue contains a list of elements, each one of which goes toward a separate crime.

Id. at 2257. Applying the above analysis to the instant case leads this Court to conclude that Georgia Code Annotated § 16-7-1 is divisible, meaning the statute contains several alternative sets of elements as opposed to alternative means of satisfying a single indivisible set of elements.

Unlike the Iowa statute at issue in *Mathis*,[2] Georgia Code Annotated § 16-7-1 identifies three distinct categories of location that are subject to unlawful entry—(1) the dwelling house of another, (2) any other building, vehicle, railroad car, watercraft, aircraft, or other structure designed for use as the dwelling of another; or (3) any other building, railroad car, aircraft. The Supreme Court made clear in the *Descamps* decision that the use of "or" to separate clauses within a provision is a strong indicator that each clause represents an alternative element for which satisfaction equates to an independent criminal offense. *See Descamps*, 133 S. Ct. at 2281 (explaining that an example of a divisible statute is one "stating that burglary involves entry into a building or an automobile"). While the foregoing weights strongly in favor of finding that the Georgia burglary statute is divisible, the fact that Georgia law requires prosecutors select, identify, and charge the specific location burgled, *see, e.g.*, *Morris v. State*, 303 S.E.2d 492, 494 (Ga. App. 1983) (stating that "where the defendant is charged with burglary, the indictment must specify the location of the burglary" and concluding indictment was sufficient where it charged a building," identified as "the Financial Aid Office and Alumni Office, located at For Valley State College"); *State v. Ramos*, 243 S.E.2d 693, 693 (Ga. App. 1978) (stating that it is not necessary

[2] In *Mathis*, the Supreme Court held that: (1) a prior conviction does not qualify as a generic form of a predicate violent felony for purposes of the ACCA if an element of the crime of conviction is made broader than an element of the generic offense by way of an enumerated list of alternative factual means for satisfaction of the former; and (2) Iowa's burglary statute—which defines "structure" to include any building, structure, [or] land, water, or air vehicle"—had a broader locational component than generic burglary. 136 S. Ct. 2247–48, 53–54. Because the "structure" element of Iowa's burglary statute was broader than the parallel element of generic burglary, the Court concluded that the petitioner's prior convictions were incapable of supporting enhancement under the enumerated offense clause. *Id.* at 2257.

to prove "the specific place" to obtain a theft-by-taking conviction, but it is necessary to prove the "specific location" to obtain a burglary conviction): *Chester v. State*, 140 S.E.2d 52, 53 (Ga. App. 1964) ("It must be alleged and proven in an indictment for burglary that there was a breaking and entering of one of the classes of buildings set out in the statute."), and fact that the Georgia Supreme Court has referred to the location of the crime as "an essential element of the offense," *DeFrancis v. Manning*, 271 S.E.2d 209 (1980), forecloses any doubt. Because the provision is divisible, *see United States v. Gundy*, No. 14-12113, 2016 WL 6892164, at *8–9 (11th Cir. Nov. 23, 2016) ("For all of the above reasons, we conclude that the alternative locational elements in the Georgia statute are divisible."); *United States v. Martinez-Garcia*, 625 F.3d 196, 198 (5th Cir. 2010) (same), the modified approach can be applied to determine of which variants Petitioner was convicted.

The state-court indictments associated with Petitioner's prior burglary convictions conclusively demonstrate that the June 16, 1999 and June 23, 2003 convictions involved burglary of "dwelling house[s]" [Doc. 35-1 pp. 2, 8] and the August 31, 1999 conviction involved burglary of a "building" that housed a business called "Village Cleaners" [Doc. 35-1 p. 5]; none of the offenses involved burglary of vehicles, railroad cars, watercraft, or aircraft. Because all three convictions fall within the scope of *Taylor*'s generic definition, all three prior Georgia burglary offenses remain predicate offenses for purposes of the ACCA enhancement.

To the extent that Petitioner's suggests the absence of a "breaking and entering" element removes all forms of Georgia burglary from the generic definition [Doc. 32 pp. 5–10 (arguing that the Georgia provision does not require "unlawful entry along the lines of breaking and entering")], this Court disagrees. While it is true that Georgia Code Annotated § 16-7-1 is capable of commission by means other than "forceful" entry, the offense nonetheless requires

that the entry or remaining in be "without authority." *State v. Newton*, 755 S.E. 2d 786, 788–789 (Ga. 2014). The fact that entering and remaining "without authority" invariably involves conduct akin to "unprivileged entry in, or remaining in," *see, e.g.*, *United States v. Bowden*, 975 F.2d 1080, 1084–85 (4th Cir. 1992) (holding that "the entry of a man who enters without breaking [but] with intent to commit a felony or larceny is neither law nor privileged, so it must be within *Taylor*"), means Georgia burglary categorically qualifies as a generic version of the offense wherever the location burgled aligns with *Taylor*'s definition of "building or structure."

V. REQUEST FOR STAY PENDING ELEVENTH CIRCUIT DECISION

In addition to the underlying petition, this Court is in possession of a request that it defer ruling on the challenge pending the Eleventh Circuit's decision in *United States v. Antonio Heard* [Doc. 36]. As support, Petitioner argues that recent requests for supplemental briefing in that case make it clear that the panel is likely to make a post-*Mathis* determination regarding divisibility of Georgia Code Annotated § 16-7-1 [*Id.* at 2–3 ("[T]he Eleventh Circuit Court of Appeals asked for supplemental briefing . . . on the very issues that are before [this] Court.")].

It is well established that "whether to stay a case pending a potentially dispositive decision in an appellate court is a pre-trial matter committed to the sound discretion of the [court]." *United States v. Johnson*, No. 3:11-CR-48, 2016 WL 4035187, at *1 (S.D. Ohio July 28, 2016). Because a separate panel of the Eleventh Circuit recently published an opinion addressing the exact same divisibility question, s*ee Gundy*, 2016 WL 6892164, at *8–9 (concluding, post-*Mathis*, that Georgia Code Annotated § 16-7-1 is divisible), this Court finds that deferring resolution of the instant petition pending the *Heard* decision is unnecessary.

VI. CONCLUSION

For the reasons discussed, Petitioner's request for deferral [Doc. 36] will be **DENIED** and § 2255 motion [Doc. 32] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

AN APPROPRIATE ORDER WILL ENTER.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE