NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20___

Billy Gene Howard - Petitioner,

v.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, where the record is unclear, a 28 U.S.C. § 2255 petitioner should be required to "affirmatively prove" that the sentencing court relied on the residual clause to determine that his prior offenses were violent felonies, before he is entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015).

(2) Whether a district court may rely on current law to evaluate whether a sentencing judge could have relied on the ACCA's enumerated offense clause to determine that a defendant's prior convictions qualified as violent felonies.

(3) Whether the concurrent sentencing doctrine bars § 2255 relief merely because a district court hypothetically could have run a defendant's sentences consecutively rather than concurrently to reach the sentence imposed.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Billy Gene Howard ("Howard"), through counsel, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 17-3485, denying his application for a certificate of appealability (COA), entered on December 4, 2018. Mr. Howard did not request rehearing by the panel or rehearing en banc.

OPINION BELOW

The order of the district court denying Mr. Howard's § 2255 motion is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Mr. Howard's application for a COA in Case No. 17-3485 is provided in Appendix B.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Mr. Howard's case under 18 U.S.C. § 3231. The district court denied Mr. Howard's 28 U.S.C. § 2255 motion on September 15, 2017. (Appendix A). Mr. Howard timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on December 4, 2018. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

28 U.S.C. § 2255:

> (a) A prisoner any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> . . .
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable..

18 U.S.C. § 924 (2011). Penalties. Subsection (e) . . .

> (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 . . . .

STATEMENT OF THE CASE

On October 1, 2003, a jury convicted Mr. Howard of one count of being a felon in possession of a firearm (Count One), in violation of 18 U.S.C. §§ 922(g) and 924(e); one count of possessing stolen firearms (Count Two), in violation of 18 U.S.C. §§ 922(j) and 924(a)(2); and one count of being an unlawful user of methamphetamine in possession of a firearm (Count Three), in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). (Crim. Doc. 48).[1] Each count carried a statutory maximum of ten years' incarceration. (PSR ¶ 80). Because Mr. Howard was found to be an Armed Career Criminal based on 1983, 1986, and 1990 convictions for Iowa second-degree burglary, and a 1997 conviction for Iowa third-degree burglary, however, his penalties on Count One were increased to a mandatory minimum term of fifteen years' incarceration to a maximum term of life. (PSR ¶¶ 32, 80). The district court sentenced Mr. Howard to 300 months on Count One, and 120 months on each of Counts Two and Three, all to be served concurrently. (Crim. Doc. 68).

Mr. Howard filed a 28 U.S.C. § 2255 petition on May 19, 2016, requesting relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1).

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[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. 6:03-CR-02024-LRR and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. References to the § 2255 petition underlying the instant petition for writ of certiorari, N.D. Iowa Case No. 6:16-CV-02048-LRR will be to "Civ. Doc.", followed by the docket entry number.

Because he had previously sought and been denied § 2255 relief on an unrelated issue, he also filed a petition for permission to bring a second or successive § 2255 petition in the Eighth Circuit Court of Appeals. (Eighth Cir. Case No. 16-2335, Entry ID: 4402716). On August 2, 2016, a panel of the Eighth Circuit granted Mr. Howard authorization to pursue his second or successive motion. (*Id.* Entry ID: 4432899).

On September 15, 2017, after the issues were briefed by the parties, the district court denied Mr. Howard's § 2255. (App. A). The district court also denied a certificate of appealability ("COA"). (*Id.* p. 14). Mr. Howard filed a timely notice of appeal with the Eighth Circuit Court of Appeals, which constitutes a request for a COA pursuant to Federal Rule of Appellate Procedure 22(b)(2). (Civ. Doc. 17). This application was denied on December 4, 2018. (App. B).

The Order denying Mr. Howard's Application for a Certificate of Appealability states simply that the application is denied, with a citation to *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018). (App. B). In *Walker*, a panel of the Eighth Circuit rejected the approach of the Fourth and Ninth Circuit Courts of Appeal, which hold that a claim for collateral relief "'relies on' *Johnson*'s new rule and satisfies § 2255 if the sentencing court 'may have' relied on the residual clause." *Id.* at 1014 (citations omitted). Instead, it adopted the approach of the First, Tenth, and Eleventh Circuit Courts of Appeals, holding that a § 2255 movant must "show by a preponderance of the evidence that the residual clause led the sentencing court

to apply the ACCA enhancement." *Id.* According to the Eighth Circuit, "[t]he mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive [§ 2255] motion." *Id.* The Eighth Circuit denied panel and en banc rehearing of its *Walker* decision on November 26, 2018. (Eighth Cir. Case No. 16-4284, Entry ID: 4728863).

REASONS FOR GRANTING THE WRIT[2]

Before a petitioner can appeal to the Court of Appeals from an order denying a § 2255 motion, either the district court or the Court of Appeals must grant a COA. 28 U.S.C. § 2253(c)(1)(B). A COA may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(1)(B), and indicates "which specific issue or issues satisfy the [substantial] showing" requirement. *Id.*

To satisfy the "substantial showing" requirement, the petitioner must

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[2] Mr. Howard notes that the appellant in the *Walker* case has filed a petition for certiorari with this Court, which is docketed as U.S. Supreme Court Case No. 18-8125. Because the Court of Appeals denied a certificate of appealability in this case based entirely on *Walker*, that case may be a more suitable vehicle for a grant of certiorari than the present case, at least with respect to the first two issues asserted herein. Should the Court agree and opt to grant certiorari in *Walker*, Mr. Howard would respectfully request that it grant certiorari, and then vacate and remand this matter for reconsideration in light of any decision therein.

demonstrate that a reasonable jurist would find the district court ruling on his constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke*, 542 U.S. 274, 276 (2004)). The petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1 (1983)). A substantial showing must be made for each issue presented. *Parkus v. Bowersox*, 157 F.3d 1136, 1148 (8th Cir. 1998). The petitioner does not have to show that the appeal is certain to succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003).

In the instant case, the district court rejected the petitioner's claim that he is entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), for three primary reasons: (1) Mr. Howard failed to prove that he was sentenced using the residual clause of the ACCA; (2) current law interpreting the enumerated clause of the ACCA may not be considered in determining whether Mr. Howard's Iowa burglary convictions qualified as violent felonies thereunder at the time of his sentencing; and (3) even if the sentencing court improperly applied the ACCA, the procedure afforded Mr. Howard was fair because the district court could have imposed consecutive sentences on each count of conviction to achieve the same 300 month total sentence that was ultimately imposed. (App. A). As demonstrated by

the clear split of authority amongst the Courts of Appeals, all of these issues are clearly debatable among jurists of reason.

I. TO BE ENTITLED TO *JOHNSON* RELIEF, IN THE FACE OF AN UNCLEAR RECORD, A § 2255 PETITIONER SHOULD NOT BE REQUIRED TO "AFFIRMATIVELY PROVE" THAT THE SENTENCING COURT RELIED ON THE RESIDUAL CLAUSE

In denying Mr. Howard's claim for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court concluded that relief was not available because Mr. Howard failed to establish that the sentencing court relied on the residual clause to find that his prior Iowa burglaries offenses were violent felonies. (App. A, pp. 6–7). In denying Mr. Howard's request for a Certificate of Appealability ("COA"), the Eighth Circuit simply cited without discussion its recent decision in *United States v. Walker*, 900 F.3d 1012 (8th Cir. 2018).

In *Walker*, as in the instant case, the record was silent as to whether the district court relied on the ACCA's residual or enumerated offense clause to determine that prior convictions constituted qualifying predicate "violent felonies" under the ACCA. *Walker*, 900 F.3d at 1014. Noting that a defendant cannot bring a second or successive § 2255 petition unless he first demonstrates that his claim "relies on" a new rule of constitutional law, the Eighth Circuit observed that "[o]ur sister circuits disagree on how to analyze this issue." *Id.* In particular, the Fourth and Ninth Circuits hold that a claim "'relies on' *Johnson*'s new rule and satisfies § 2255 if the sentencing court 'may have' relied on the residual clause." *Id.*; *see United States v. Geozos*, 870 F.3d 890, 8986 (9th Cir. 2017) (drawing an analogy to

the rule in *Stromberg v. California*, 283 U.S. 359, (1931), that a conviction must be set aside if a jury verdict may have rested on an unconstitutional basis); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("We will not 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."). The First, Tenth, and Eleventh Circuits, by contrast, "require a movant to show that it is more likely than not that the residual clause provided the basis for an ACCA sentence." *Walker*, 900 F.3d at 1014 ("These courts emphasize that a § 2255 movant bears the burden of showing that he is entitled to relief and stress the importance of the finality of convictions[.]"); *see Dimott v. United States*, 881 F.3d 232, 243 (1st Cir. 2018); *United States v. Washington*, 890 F.3d 891, 896 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

The *Walker* court opted to adopt the approach of the First, Tenth, and Eleventh Circuits, which denies a § 2255 petitioner relief unless he first "show[s] by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Walker*, 900 F.3d at 1015. According to the Eighth Circuit, the "mere possibility that the sentencing court relied on the residual clause is insufficient to satisfy this burden and meet the strict requirements for a successive motion." *Id.*

Mr. Howard submits that the approach adopted by the Eighth Circuit in *Walker* is flatly incorrect, and that the approach of the Fourth and Ninth Circuits is

the only one that will adequately protect a § 2255 petitioner's entitlement to relief under this Court's decision in *Johnson*. It must be remembered that, at the time of Mr. Howard's sentencing in 2004, defendants had no incentive to challenge their prior convictions as being non-generic burglaries. Indeed, a successful challenge on that ground would have been futile because those convictions would still have qualified as violent felonies under the residual clause. *See, e.g.*, *Slaughter v. United States*, No. 4:16-cv-915-CAS, 2017 WL 1196483, at *3 (E.D. Mo. Mar. 31, 2017) ("[W]ithout *Johnson*'s invalidation of the residual clause, movant would not have had a claim under *Mathis* that he is not an armed career criminal."); *Davis v. United States*, 1:16-cv-154-RWS, 2017 WL 1477126, at *2 (E.D. Mo. Apr. 25, 2017) (same); *Givens v. United States*, No. 4:16-cv-1143-CAS, 2016 WL 7242162, at *3 (E.D. Mo. Dec. 15, 2016) (same); *Hardman v. United States*, 191 F. Supp. 3d 989, 993 (W.D. Mo. 2016) (recognizing that Johnson's invalidation of the residual clause would force parties to litigate the question of whether a particular state burglary conviction would qualify under the enumerated clause). Because the residual clause swept so broadly, neither Mr. Howard nor the government had any incentive to clarify which clause of the ACCA the district court relied upon to determine that Mr. Howard's prior burglaries were crimes of violence, and the court was under no obligation to elucidate the reasons for its decision, particularly because the question was not in dispute between the parties. *See United States v. Taylor*, 873 F.3d 476, 481–82 (5th Cir. 2017) (rejecting a district court's criticism of a petitioner for failing

to request clarification of which clause the district court relied on for its ACCA determination at the time of sentencing, emphasizing that nothing in the law required the sentencing court to make such a finding and, moreover, that petitioner had no incentive to request clarification at the time).

The record in this case does not establish whether the district court relied on the enumerated or residual clause to conclude that Mr. Howard's prior burglary offenses qualified as violent felonies under the ACCA. In paragraph 32 of the PSR, the presentence writer states simply that the Iowa burglary convictions qualify Mr. Howard as an Armed Career Criminal, with no reference to any particular clause of the ACCA. The district court, likewise, made no comment at sentencing on the basis for its ACCA determination, stating simply that the "armed career criminal was correctly scored." (Sent. Tr. p. 15).

The uncertainty in Mr. Howard's case, and in that of numerous other § 2255 petitioners, demonstrates why the position of the First, Tenth, and Eleventh Circuit's is unsustainable. A petitioner seeking collateral review should not be required to make an affirmative showing that the district court *actually relied* on the residual clause before being considered for *Johnson* relief. Indeed, such a showing will often be impossible where, as here, the record is silent on the issue and the district court opts to ignore subsequently decided case law clarifying whether the enumerated offense clause could have been used to deem prior offenses violent felonies in the first instance. Rather, if the evidence shows that the district court

may have relied on the residual clause, fundamental fairness requires that the case be reviewed to determine if *Johnson* relief is warranted. This interest in fundamental fairness is part of why the Fourth Circuit held in *Winston* that it would not penalize a § 2255 petitioner for the sentencing court's "discretionary choice not to specify under which clause of § 924(e)(2)(B) an offense qualified as a violent felony." *Winston*, 850 F.3d at 682; *see also Taylor*, 873 F.3d at 481–82 (declining to adopt a specific position, but noting that "this court will not hold a defendant responsible for what may or may not have crossed a judge's mind during sentencing"). It also underlies the Ninth Circuit's decision in *Geozos*, that a claim "'relies on' the constitutional rule announced in *Johnson*" if the district court "may have" relied on the residual clause in its ACCA determination.

II. DISTRICT COURTS MAY RELY ON CURRENT LAW TO EVALUATE WHETHER A SENTENCING JUDGE COULD HAVE RELIED ON THE ACCA'S ENUMERATED OFFENSE CLAUSE TO DETERMINE THAT A DEFENDANT'S PRIOR CONVICTIONS QUALIFIED AS ACCA VIOLENT FELONIES.

To determine whether a prior conviction qualifies as a "violent felony" under the ACCA, sentencing courts apply the categorical approach, "look[ing] only to the statutory definitions – i.e., the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *Taylor v. United States*, 495 U.S. 575, 600–01 (1990). Courts may look to a limited set of documents to determine the applicable elements of a prior conviction – applying the so-called "modified categorical approach" – only

when the statute is divisible, i.e., when it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct. at 2284. Because the Iowa burglary statute applicable to all of Mr. Howard's prior convictions contains a single, indivisible set of elements that sweeps more broadly than the generic definition of burglary, this Court squarely held in *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016), that an Iowa burglary conviction cannot qualify as a "violent felony" under the ACCA's enumerated offense clause.

While acknowledging the holding in *Mathis*, the government nonetheless argued to the district court that it was irrelevant that Mr. Howard "would no longer be subject to the enhanced ACCA statutory range of punishment, because *Descamps* and *Mathis* do not provide an independent constitutional basis for attacking the movant's sentence." (App. A, pp. 3–4). Apparently, the district court accepted the government's argument, because it held that it "matters not that, if the court sentenced movant today, *Mathis* would dictate a different sentence because the movant is unable to apply rules of statutory construction that were not in effect at the time he was sentenced." (*Id.*, pp. 12–13).

To be clear, Mr. Howard does not argue, and has never argued, that *Mathis* or *Descamps* provide an independent constitutional basis for granting relief. Nonetheless, *Mathis* is directly relevant in this case, given the fundamental principle of statutory construction articulated by the Supreme Court in *Rivers v. Roadway Express, Inc.*, that "[a] judicial construction of a statute is an authoritative

statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." 511 U.S. 298, 312–13, n.12 (1994) (emphasis added). To be sure, the *Mathis* Court emphasized that it was *not* creating a new rule or even interpreting categorical approach law in a new way:

> For more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense. They may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition. And that rule does not change when a statute happens to list possible alternative means of commission: Whether or not made explicit, they remain what they ever were—just the facts, which ACCA (so we have held, over and over) does not care about.

Mathis, 136 S. Ct. at 2257. Accordingly, *Mathis* makes clear that had Mr. Howard's sentencing judge conducted a proper categorical analysis of Iowa's burglary statute, it could not have found it to be a qualifying ACCA predicate under the enumerated offense clause, despite contrary authority that may have existed at the time. Since Iowa burglary does not qualify as a violent felony under the ACCA's force clause, this necessitates a conclusion that the district court *must have* relied on the residual clause to conclude that Mr. Howard was an Armed Career Criminal, because that was the only legally accurate basis on which it could have done so.

The district court's conclusion that it could only consider the state of the law at the time of petitioner's sentencing in deciding whether he is entitled to relief under *Johnson* has been rejected by other appellate courts. Most recently, in *Geozos*, the Ninth Circuit emphatically stated that, in determining whether a prior

conviction qualified as an armed career criminal predicate under the force clause, "we look to the substantive law concerning the force clause as it *currently* stands, not the law as it was at the time of sentencing." *Geozos*, 870 F.3d at 897 (citing *Rivers v. Roadway Express*, 511 U.S. at 312–13). Similarly, in *Winston*, the Fourth Circuit applied intervening case law to determine whether a petitioner had been prejudiced by the court's reliance on the residual clause in imposing sentence. *Winston*, 850 F.3d at 683–84; *see also In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016) (rejecting the notion that the district court can "ignore decisions from the Supreme Court that were rendered since [the time of sentencing] in favor of a foray into a stale record"). A district judge in North Dakota may have stated the countervailing view to the district court's position in this case most succinctly: "The court's review is not constrained to the law as it existed when the movant was sentenced, but should be made with the assistance of binding intervening precedent which clarifies the law." *Eaton v. United States*, No. 1:16-cv-135, 2017 WL 3037435, at *2 (D.N.D. July 18, 2017).

Consistent with precedent, Mr. Howard maintains that intervening changes or interpretations of the law must also be considered in determining whether he was prejudiced by the constitutional violation that resulted from the district court's reliance on the residual clause to determine that his prior burglary offenses qualified as violent felonies under the ACCA. The Supreme Court recognized in *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1993), that current law should be applied to

determine prejudice in the habeas context. In *Fretwell*, the Supreme Court found that the petitioner was not prejudiced by counsel's failure to object to the use of a capital sentencing aggravating factor even though controlling case law at the time of sentencing would have supported such an objection, where the controlling case law had been reversed by the time Fretwell filed his federal habeas corpus petition. *Id.* at 371. In other words, the Court found that case law decided after sentencing should be used when analyzing the prejudice component of an ineffective assistance of counsel claim.

Cases such as *United States v. Moreno*, No. 11-178 ADM/LIB, 2017 WL 811874, at *4–6 (D. Minn. Mar. 1, 2017), *In re Hires*, 825 F.3d 1297, 1303 (11th Cir. 2016), and the others relied upon by the district court, stand in contrast to a series of well-reasoned cases recognizing that *Curtis Johnson v. United States*, 559 U.S. 133 (2010), *Descamps*, 133 S. Ct. 2276, and *Mathis*, 136 S. Ct. 2243, can and should be considered in deciding whether *Johnson* relief is available. *See, e.g.*, *United States v. Wilson*, 2017 WL 1383644, at *4 (D.D.C. Apr. 18, 2017); *United States v. Booker*, 2017 WL 829094, at *4 (D.D.C. Mar. 2, 2017); *Taylor v. United States*, 2016 WL 6995872, at *4 (E.D. Mo. Nov. 30, 2016); *see also In re Adams*, 825 F.3d 1283, 1286 (11th Cir. 2016) (granting SOS petition); *United States v. Christian*, 668 F. App'x. 820, 820–21 (9th Cir. Sept. 16, 2016); *Mitchell v. United States*, 2017 WL 1362040, at *2–3 (W.D. Mo. Apr. 11, 2017) (explaining relationship between *Johnson* and *Mathis*, finding that petitioner's claim relies on *Johnson*, and then

applying *Mathis* to hold that Missouri burglary convictions are no longer violent felonies under the enumerated clause). Numerous courts have likewise recognized that "current precedent interpreting [the] ACCA and the elements clause" must be considered in assessing whether a § 2255 petitioner has shown prejudice. *United States v. Booker*, 2017 WL 829094, at *4, (D.D.C. Mar. 2, 2017); *see also United States v. Brown*, 2017 WL 1383640, at *3 (D.D.C. Apr. 12, 2017) (citing *Booker* to hold that simply relying on current precedent, such as *Curtis Johnson*, to show that a predicate is not a violent felony under the force clause "does not convert [petitioner's *Johnson*] motion into a habeas motion based on older cases"); *Taylor*, 2016 WL 6995872, at *4 ("[B]y applying the teaching of *Mathis* to this case, this Court merely applies the law the Supreme Court articulated prior to the time movant was sentenced.")

III. THE CONCURRENT SENTENCING DOCTRINE IS NOT APPLICABLE AND SHOULD NOT HAVE BEEN USED BY THE DISTRICT COURT TO DENY § 2255 RELIEF.

The district court *sua sponte* determined that *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (en banc) and *Olten v. United States*, 565 F. App'x 558, 561 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1893 (2015), preclude § 2255 relief. Specifically, the district court held that *Sun Bear* conclusively resolves [Howard's] § 2255 motion because a sentence does not constitute a miscarriage of justice if it is within the statutory maximum term of imprisonment." (App. A, p. 4). According to the district court, *Sun Bear* required Howard to show that the "court could not have

imposed 300 months imprisonment as his total punishment," which Howard could not do because the sentencing court could have imposed "legal sentences on the counts of conviction and used consecutive sentences (rather than concurrent) to achieve the same 'total punishment.'" (*Id.* p. 5). The district court's holding in this regard is incorrect, as *Sun Bear* and *Olten* do not control the disposition of this case.

In *Sun Bear*, the court held that *ordinary* claims of guidelines interpretation that do not raise *constitutional* questions do not present cognizable claims under § 2255 unless they rise to the level of a miscarriage of justice. *Sun Bear*, 644 F.3d at 704–05. When read properly, however, *Sun Bear* actually supports the conclusion that Mr. Howard's claim is cognizable, stating that § 2255 "provides a remedy for jurisdictional and *constitutional* errors," the latter of which is squarely at issue here. *Id.* at 704 (emphasis added). Here the constitutional error in applying the ACCA to Mr. Howard resulted in a sentence far in excess of the ten-year statutory maximum that otherwise would have been applicable. The constitutional error cannot be dismissed based on mere speculation that the district court *could have* stacked sentences to reach a result that most likely would not even have been considered an option but for the constitutional error.

Relying on *Sun Bear*, the *Olten* court concluded that § 2255 relief could be denied because it was possible that even if relief was granted on an invalid ACCA count, the district court could impose the same total aggregate sentence by ordering the former ACCA count to be served consecutively to the sentence on another count

which *Olten* had not challenged. *Olten*, 565 F. App'x at 561. Running Mr. Howard's other sentences consecutively, however, may be not quite so simple as the district court supposes. Upon resentencing, the court would be constrained by this Court's opinion in *United States v. Richardson*, which held that Congress intended the "'allowable unit of prosecution' to be an incident of possession regardless of whether a defendant satisfied more than one 922(g) classification, possessed more than one firearm, or possessed a firearm and ammunition." 439 F.3d 421, 422–23 (8th Cir. 2006) (citations omitted); *see also United States v. Woolsey*, 759 F.3d 905, 908 (8th Cir. 2014) (affirming Richardson's holding with one caveat – that possession of a firearm and ammunition comprise only one offense "barring proof that the firearms were obtained at different times or stored separately.") In Mr. Howard's case, the time periods alleged for possession of the firearms in counts one, two, and three overlap, and the firearms are identical. (PSR ¶¶ 2–4). Put another way, pursuant to *Richardson*, the district court likely would have been prohibited from running the sentences on Mr. Howard's three counts of conviction consecutively. Thus, his overall punishment would have been no more than 120 months total – rather than the 300 month sentence actually imposed – had the ACCA been correctly found inapplicable. This case presents a classic example of the dangers of denying relief based on the sentence a district court hypothetically could have imposed on a petitioner, rather than based on the sentence it actually did impose. *See Olten v. United States*, 565 F. App'x at 562 (Kelly, J., concurring).

CONCLUSION

For the foregoing reasons, Mr. Howard respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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