

App. No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ROBBIE SHANE BATEMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE  
PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioner, Robbie Shane Bateman, by his counsel, respectfully requests pursuant to Supreme Court Rule 13.5 and Rule 22 that the time for a petition for writ of certiorari in this matter be extended for 60 days to and including March 16, 2020. The United States Court of Appeals for the Sixth Circuit issued its judgment and opinion reversing the district court's grant of relief under 28 U.S.C. § 2255 on October 16, 2019 (*see* Appendix). Mr. Bateman's time to petition for writ of certiorari in this Court would therefore expire on January 14, 2020, absent an extension. Mr. Bateman files this application at least ten days before that date, and supports his

request as follows:

1. In 2012, Mr. Bateman was sentenced in the Eastern District of Tennessee to 188 months in prison pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”), after pleading guilty to four counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).<sup>1</sup> At the time, courts held that prior convictions for Tennessee aggravated burglary counted as a “violent felony” for purposes of the ACCA, and Mr. Bateman had seven such convictions. This case concerns issues that have arisen in the wake of the Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), as unconstitutionally vague and which was subsequently made retroactive on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

2. Relying on *Johnson*, Mr. Bateman moved for relief under 28 U.S.C. § 2255, asserting that his Tennessee aggravated burglary convictions do not qualify as ACCA predicates in the absence of the residual clause. At the time, the government agreed that because the Sixth Circuit held that Tennessee aggravated burglary sweeps more broadly than generic burglary with respect to its definition of “habitation,” *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc), Mr. Bateman was entitled to relief from the ACCA sentence. Accordingly, the district court granted his § 2255 motion and reduced his sentence to 71 months, after which

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<sup>1</sup> Mr. Bateman was prosecuted in two separate cases, E.D. Tenn. Case Nos. 3:11-cr-42, 3:11-cr-144, which were consolidated for briefing and disposition in Sixth Cir. Case Nos. 17-6340/6343.

he was released from prison in August 2018. The government appealed, having noted at resentencing that it believed the Sixth Circuit wrongly decided *Stitt*.

3. Four months later, this Court reversed *Stitt*, holding that Tennessee’s definition of “habitation” is not broader than the “structure” element of generic burglary. *United States v. Stitt*, 139 S. Ct. 399 (2018). Mr. Bateman nonetheless urged the Sixth Circuit to affirm the grant of relief on different grounds. First, he argued that Tennessee aggravated burglary is overbroad for a reason unaddressed by *Stitt*, which is that the “entry” element under Tennessee law encompasses mere attempted burglary, so is broader than generic burglary under *James v. United States*, 550 U.S. 192, 198 (2007). Second, Mr. Bateman argued that the records of his burglary convictions do not establish that he committed the offenses on different occasions, as required by the ACCA. He argued that under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and a 2017 decision by the Sixth Circuit announcing a new Circuit rule about what evidence courts may consider in deciding the “different occasions” question, *United States v. King*, 853 F.3d 267 (6th Cir. 2017), the district court could not discern from the elements of his convictions that he committed them on occasions different from one another.

4. The Sixth Circuit reversed. It rejected Mr. Bateman’s “entry” argument on the ground that the court was bound by Circuit precedent rejecting the same argument in a similar government appeal of the grant of *Johnson* § 2255 relief (relying on pre-*Stitt* Circuit precedent). See *Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir. 2019) (relying on *United States v. Nance*, 481 F.3d 882, 888 (6th

Cir. 2007)). It rejected Mr. Bateman’s “different occasions” argument as forfeited, not having been raised in the district court (though he had no reason to raise it, given the government’s concession), and in any event as time-barred under 28 U.S.C. § 2255(f)(3). The Sixth Circuit reasoned that because Mr. Bateman’s *King* claim ultimately rested on *Mathis* and the rule in *Shepard v. United States*, 544 U.S. 13 (2005), applied in *Mathis*, he does not rely on any “newly recognized right” for purposes of § 2255(f)(3). It remanded the case with instructions to reinstate the ACCA sentence.

5. Good cause supports granting an extension of time. The Sixth Circuit is still considering the question whether the Tennessee “entry” element is broader than the “entry” element of generic burglary. The issue is currently pending in a direct appeal, *United States v. Buie*, No. 18-6185 (6th Cir.), argued in August 2019. The Sixth Circuit’s resolution of the “entry” issue in *Buie* will impact Mr. Bateman’s case and any petition for certiorari he files. So that his petition has the benefit of the Sixth Circuit’s analysis, he asks for an extension of 60 days in the expectation that a decision will issue during that time.

6. In addition, this Court is currently considering a petition for certiorari in *Hennessee v. United States*, No. 19-5924, which raises the question whether district court judges may properly find non-elemental facts to establish that ACCA predicate offenses were committed on different occasions. This Court’s disposition of the petition for certiorari in *Hennessee* could also impact Mr. Bateman’s petition for certiorari.

For the foregoing reasons, Mr. Bateman asks this Court to extend the time to file a petition for a writ of certiorari in this appeal 60 days to and including March 16, 2020.

Respectfully submitted,

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## APPENDIX

Decision of the Court of Appeals, <i>United States v. Bateman</i> , 6th Cir. Case Nos. 17-6340/6343 (October 16, 2019) . . . . .	1a
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aggravated-burglary statute does not qualify as an enumerated offense under the ACCA. *Id.* at 857. Following *Stitt I*, the district court granted Bateman's petition, vacated his original sentence, and ordered resentencing. The Supreme Court, however, reversed the decision of the en banc court. *United States v. Stitt*, 139 S. Ct. 399, 408 (2018) [hereinafter *Stitt II*]. The government now appeals the district court's granting of Bateman's habeas petition in light of *Stitt II* and seeks reinstatement of Bateman's original sentence.

Bateman advances two grounds opposing reversal. First, Bateman claims that Tennessee's definition of "entry" is broader than the ACCA's, such that it considers attempted burglary as completed burglary. Bateman contends that because an attempted burglary does not qualify as a generic burglary, it does not qualify as a violent felony under the ACCA. Bateman's position has already been before this Court, and we are bound by our prior decisions that a violation of the Tennessee-aggravated burglary statute qualifies as a violent felony. *Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir. 2019); see *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007).

Second, Bateman asserts that the approved evidence available to the government cannot conclusively establish that his predicate offenses under the ACCA were committed on three separate occasions, as required by 18 U.S.C. § 924(e)(1). This argument was not before the district court in Bateman's original petition or supplement to his petition and is raised here for the first time. Ordinarily, "issues not presented to the district court but raised for the first time on appeal are not properly before the court." *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993) (quoting *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1488 (6th Cir. 1991)). There are, to be sure, some exceptions, such as when faced with "exceptional cases," "particular circumstances," or times when the rule would produce "a plain miscarriage of justice." *Pinney*



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*Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (quoting *Hormel v. Helvering*, 312 U.S. 552, 558 (1941)).

Even if Bateman's claim was within the bounds of these narrow exceptions, it nevertheless fails as untimely. Section 2255(f) places a one-year period of limitations on all § 2255 petitions for relief, running from the latest of any of the following:

- (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). Unlike Bateman's original petition which, by relying on *Johnson*, satisfied category three, Bateman's new claim that he does not have three qualifying ACCA predicates does not rely on any newly recognized right. Instead, Bateman bases his assertion on *United States v. King*, 853 F.3d 267 (6th Cir. 2017), where this Court applied the standards approved in *Shepard v. United States*, decided over nine years before his petition. 544 U.S. 13, 26 (2005) (limiting the class of documents used by a court to determine of what crime and elements a defendant was convicted).

Because Bateman's claim for relief on these new grounds does not meet any of the alternative limitations periods,<sup>1</sup> he was required to file it within one year of his conviction

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<sup>1</sup> Bateman does not offer any reason why his § 2255 petition satisfies the second or fourth one-year limitations categories.

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becoming final. 28 U.S.C. § 2255(f)(1). Bateman's conviction became final on February 29, 2012. Bateman's § 2255 motion was not filed until June 18, 2014, over two years after his conviction became final. Therefore, Bateman's alternative argument is untimely.

For the foregoing reasons, we **REVERSE** the district court's grant of habeas relief, and **REMAND** with instructions to reinstate the original sentence.