No. 20-400

In the Supreme Court of the United States

JAMES AVERY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a former version of the Georgia burglary statute, Ga. Code Ann. § 26-1601 (Supp. 1977), is a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is reprinted at 819 Fed. Appx. 749. The opinion and order of the district court (Pet. App. 9a-22a) is not published in the Federal Supplement but is available at 2018 WL 9537836.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2020. The petition for a writ of certiorari was filed on September 25, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing a firearm as a felon, in violation

of 18 U.S.C. 922(g)(1), 924(a)(2), and 18 U.S.C. 924(e)(1) (Supp. II 2002). Judgment 1. He was sentenced to 210 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed. 205 Fed. Appx. 819. The district court later denied petitioner's motion under 28 U.S.C. 2255 to vacate his sentence and declined to issue a certificate of appealability (COA). 08-cv-22 D. Ct. Doc. 33, at 8 (Apr. 1, 2010). The court of appeals dismissed petitioner's appeal for lack of jurisdiction. 10-14361 C.A. Order (Dec. 8, 2011).

In 2016, petitioner obtained leave from the court of appeals to file a second Section 2255 motion to challenge his sentence in light of *Johnson* v. *United States*, 576 U.S. 591 (2015). 16-12733 C.A. Order (June 15, 2016). The district court denied the motion and declined to issue a COA. Pet. App. 9a-22a. The court of appeals granted a COA, 18-14430 C.A. Order (Mar. 29, 2019), and affirmed, Pet. App. 1a-8a.

1. In February 2005, petitioner sold a firearm to an undercover law enforcement agent. 205 Fed. Appx. at 821-822. Petitioner was indicted on one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2), and 18 U.S.C. 924(e)(1) (Supp. II 2002). 205 Fed. Appx. at 820. Following a jury trial, petitioner was convicted of the felon-in-possession offense. *Ibid.*

The default term of imprisonment for the offense of unlawfully possessing a firearm as a felon is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense" committed on

separate occasions. The ACCA defines a "violent felony" as any crime punishable by a term of imprisonment exceeding one year that either:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The definition in subsection (i) is known as the "elements clause"; the first part of subsection (ii) is known as the "enumerated offenses clause"; and the second part of subsection (ii), beginning with the word "otherwise," is known as the "residual clause." *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016).

Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term to include "any crime, 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." *Id.* at 599. In *United States* v. *Stitt*, 139 S. Ct. 399 (2018), this Court clarified that "building" or "structure," for purposes of the generic-burglary definition, includes vehicles "adapted or customarily used for lodging." *Id.* at 406.

Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction is for an offense that "substantially corresponds" to the "generic" form of burglary referenced in the ACCA.

495 U.S. at 600, 602. If the statute does not substantially correspond to the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless—under what is known as the "modified categorical approach"—(1) the statute is "'divisible'" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016) (citation omitted); *Descamps* v. *United States*, 570 U.S. 254, 262-264 (2013); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005) (plurality opinion).

2. Before sentencing in this case, the Probation Office prepared a presentence report stating that petitioner had several prior felony convictions that qualified as "violent felonies" for purposes of the ACCA: (1) a 1978 Georgia burglary conviction; (2) a 1978 Georgia armed robbery conviction; (3) a 1978 Georgia robbery conviction; (4) 1987 Florida convictions for armed burglary and robbery with a firearm (committed on the same occasion); (5) a 1972 Alabama second-degree burglary conviction; and (6) a 1974 Alabama second-degree burglary conviction. Presentence Investigation Report (PSR) ¶¶ 39, 42-46, 80; Pet. App. 11a; see Pet. App. 2a. Although the presentence report recommended that petitioner receive an enhanced sentence under the ACCA, see PSR ¶ 80, it "did not * * * specify which of [petitioner's] prior convictions it relied on in determining that he was subject to the ACCA enhancement," Pet. App. 2a.

Petitioner objected to the enhancement, arguing that the jury, or alternatively the sentencing court, had to find his prior convictions beyond a reasonable doubt

and that "the government had failed to prove he was the person who committed the crimes" listed in the presentence report. Pet. App. 3a, 11a; see 205 Fed. Appx. at 822-823; 18-14430 Gov't C.A. Br. 3. At sentencing, "the district court admitted certified copies of records of several of [petitioner's] convictions * * * [and] [t]he government also presented extensive testimony and numerous exhibits demonstrating that [petitioner] was the person who committed the crimes listed in the [presentence report's] criminal history section." Pet. App. 3a; see 18-14430 Gov't C.A. Br. 4.

"The district court overruled [petitioner's] objections, adopted the [presentence report], and imposed the ACCA enhancement," citing petitioner's Georgia robbery, Georgia armed robbery, and Florida armed burglary convictions as ACCA predicate offenses. Pet. App. 3a & n.3. The court did not specifically state which clause or clauses of the ACCA definition of "violent felony" it was relying on. *Id.* at 3a. The court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. Pet. App. 3a; Judgment 2-3.

3. Petitioner appealed. As to his sentence, petitioner argued that "the district court erred by applying [the ACCA] based on prior convictions that were neither admitted nor proven to the jury beyond a reasonable doubt." Pet. App. 4a. The court of appeals affirmed. 205 Fed. Appx. at 825-826.

In 2008, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence, raising "claims not related to the one at issue here." Pet. App. 4a; 08-cv-22 D. Ct. Doc. 1 (Jan. 3, 2008). The district court denied the motion and declined to issue a COA. Pet. App. 4a; 08-cv-22 D. Ct. Doc. 33, at 8. The court of appeals

granted petitioner a COA but subsequently dismissed his appeal for lack of jurisdiction because petitioner failed to file a proper or timely notice of appeal. 10-14361 C.A. Order (Feb. 7, 2011); 10-14361 C.A. Order 2-3 (Dec. 8, 2011).

4. In 2015, this Court held in *Johnson* v. *United States*, *supra*, that the ACCA's residual clause is unconstitutionally vague. 576 U.S. at 595. The Court explained, however, that its decision invalidating the residual clause "d[id] not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony." *Id.* at 606. The Court later held in *Welch* v. *United States*, *supra*, that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. 136 S. Ct. at 1265.

In 2016, petitioner sought authorization from the court of appeals to file a second motion under Section 2255 to vacate his sentence. Pet. App. 4a, 13a. Section 2255(h)(2) allows a second or successive collateral attack if a court of appeals panel "certifie[s] as provided in [S]ection 2244" that the motion "contain[s]" a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2255(h)(2); see 28 U.S.C. 2244(b)(3)(C). The court of appeals granted authorization. Pet. App. 4a.

Petitioner filed his second Section 2255 motion in the district court. "In support of that motion, [petitioner] argued that it was more likely than not that the sentencing court relied on ACCA's residual clause when determining that his Georgia robbery and armed robbery and Florida armed burglary convictions were ACCA predicate offenses." Pet. App. 4a; see 1 C.A. E.R. 88. He

further contended that none of his prior convictions qualified as violent felonies under the elements clause or the enumerated offenses clause. Pet. App. 13a; 1 C.A. E.R. 104-136.

In opposing petitioner's Section 2255 motion, the government relied on circuit precedent requiring that to prevail on a claim based on *Johnson*, a Section 2255 movant "must show" that (1) the district court that imposed the ACCA sentence "more likely than not," as a matter of "historical fact," relied on the residual clause that *Johnson* invalidated, as opposed to one of the still-valid clauses, and (2) "there were not at least three other prior convictions that could have qualified under" either of the other clauses of the ACCA's violent-felony definition, or as a serious drug offense. *Beeman* v. *United States*, 871 F.3d 1215, 1221-1222, 1224 n.5 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019); see Pet. App. 5a. The government argued that petitioner failed to meet either requirement, because "the record was silent as to which ACCA clause the sentencing court relied on," and six of petitioner's prior convictions continued to qualify as violent felonies following *Johnson*. Pet. App. 5a; see 2 C.A. E.R. 13-27; 3 C.A. E.R. 164-165.

The district court denied the Section 2255 motion, finding that petitioner "had failed to satisfy either" of the two prerequisites for relief. Pet. App. 5a; see *id.* at 9a-22a. First, the court found that "[n]othing in the record prior to [petitioner's] sentencing hearing, in the sentencing hearing itself, or in the proceedings following [petitioner's] sentencing hearing establishes (or even suggests) that this Court relied upon the ACCA's residual clause when enhancing [petitioner's] sentence." *Id.* at 16a-17a; see *id.* at 16a ("This Court does not find that it relied on the ACCA's residual clause

when sentencing [petitioner].”). Second, the district court found that at least three of petitioner’s prior convictions continued to qualify as violent felonies under the ACCA: his 1987 Florida robbery with a firearm conviction (under the elements clause), his 1978 Georgia armed robbery conviction (also under the elements clause), and his 1978 Georgia burglary conviction (under the enumerated offenses clause). *Id.* at 17a-20a. Because those three convictions sufficed to maintain petitioner’s ACCA sentence, the court “decline[d] to consider” whether petitioner’s Alabama burglary convictions or Georgia robbery conviction also qualified as ACCA predicate offenses. *Id.* at 20a; see *id.* at 17a n.10 (observing that court was not precluded from considering all of the qualifying offenses in the presentence report). The court declined to grant a COA. *Id.* at 21a.

5. The court of appeals granted a COA and affirmed in an unpublished, per curiam opinion. Pet. App. 1a-8a. The court agreed with the district court that petitioner’s prior convictions for Florida robbery with a firearm, Georgia armed robbery, and Georgia burglary “qualified as ACCA predicates notwithstanding *Johnson*.” *Id.* at 6a-8a.

As relevant here, the court of appeals rejected petitioner’s argument that the Georgia burglary statute in effect when he committed his 1977 offense “was categorically too broad” to qualify as ACCA “burglary,” Pet. App. 7a, on the theory that it applies to an overbroad list of alternative locations, and is “indivisible with regard to the ‘type of structure’ element,” Pet. C.A. Br. 21-23. The court of appeals observed that petitioner’s argument was “foreclosed” by its decision in *United States* v. *Gundy*, 842 F.3d 1156 (11th Cir. 2016),

cert. denied, 138 S. Ct. 66 (2017), "which held that" convictions under "a virtually identical later version of Georgia's burglary statute" may qualify as "predicate[s] under ACCA's enumerated crimes clause," because the statute "sets out separate crimes based on the location the defendant entered (a dwelling, building, railroad car, vehicle, or watercraft), some of which qualify as ACCA predicates." Pet. App. 7a (citing *Gundy*, 842 F.3d at 1167-1168). The court "acknowledge[d] that the Fourth Circuit recently disagreed with *Gundy*." *Id.* at 7a n.6.

Having determined that the Georgia burglary statute is divisible, the court of appeals applied the modified categorical approach to petitioner's prior conviction. Pet. App. 7a. The court observed that petitioner "d[id] not dispute that," like the defendant in *Gundy*, his prior crime involved "burglary of a 'building housing a business,' which * * * satisfies ACCA's definition." *Ibid.* (brackets and citation omitted); see PSR ¶ 45; 16-cv-1143 D. Ct. Doc. 19-8, at 3 (June 9, 2017) (state court indictment). The court therefore determined that petitioner's Georgia burglary conviction qualified as a "violent felony" under the ACCA, "notwithstanding *Johnson*." Pet. App. 8a.

Because petitioner had three qualifying ACCA convictions notwithstanding *Johnson*, the court of appeals declined to address the district court's determination that petitioner also failed to demonstrate that the sentencing court more likely than not relied on the residual clause in imposing his ACCA sentence. Pet. App. 6a, 8a. The court likewise declined to address the government's contention that petitioner had procedurally defaulted his *Johnson* claim by failing to challenge the validity of the residual clause at sentencing or on direct

appeal, *id.* at 4a n.4, or its contention that petitioner's additional convictions also qualified as violent felonies under the ACCA, see Gov't C.A. Br. 48-51.

ARGUMENT

Petitioner renews the contention (Pet. 11-31) that his ACCA sentence is invalid because Georgia's 1977 burglary statute applies to an overbroad and indivisible list of alternative locations. No further review of that question is warranted. While petitioner alleges a narrow disagreement among the courts of appeals, the court of appeals' unpublished decision in this case is correct, no square conflict exists among the courts of appeals regarding the divisibility of the now-superseded version of the Georgia burglary statute under which petitioner was convicted, and this Court typically defers on state-law questions to the court of appeals for the circuit in which the State is located, see *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004), which here is the court below. In addition, even if the question presented otherwise merited review, this case is not a suitable vehicle because petitioner cannot demonstrate that he is entitled to relief. This Court has twice denied petitions for writs of certiorari in cases raising the same issue—once in the prior case on which the court of appeals here relied, *Gundy* v. *United States*, 138 S. Ct. 66 (2017) (No. 16-8617), and once following the emergence of petitioner's alleged circuit conflict, *Holmes* v. *United States*, 140 S. Ct. 2518 (2020) (No. 19-6296). The same result is warranted here.

1. At the time of petitioner's Georgia burglary offense, the Georgia burglary statute stated:

> A person commits burglary when, without authority and with intent to commit a felony or theft therein,

> he enters or remains within the dwelling house of another or any building, vehicle, railroad car, aircraft, 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. § 26-1601 (Supp. 1977); see Pet. App. 25a.

In *United States* v. *Gundy*, 842 F.3d 1156 (11th Cir. 2016), cert. denied, 138 S. Ct. 66 (2017), the court of appeals determined that a Georgia burglary statute "virtually identical" to the one at issue here is divisible by locational element. Pet. App. 7a.[1] *Gundy* recognized that its task under *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), was to identify the elements of the Georgia statute, including whether the permutations of the statute involved elements of separate offenses or different means of satisfying a single element, and to match the elements of a particular defendant's offense of conviction to the ACCA's definition of generic burglary. 842 F.3d at 1161-1164; see *Mathis*, 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."); see also *Taylor* v. *United States*, 495 U.S. 575, 598 (1990). In undertaking that task, *Gundy* employed the methodology described in *Mathis*, looking to the text of the state statute, state court decisions interpreting that

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[1] The decision here addressed the 1977 version of the statute; *Gundy* and the Sixth Circuit's decision in *Richardson* v. *United States*, 890 F.3d 616, cert. denied, 139 S. Ct. 349 (2018), addressed the "virtually identical" 1980 version of the statute, Pet. App. 7a; and the Fourth Circuit's decision in *United States* v. *Cornette*, 932 F.3d 204 (2019), addressed the 1968 version of the statute, see p. 15, *infra*.

text, and, as necessary, a defendant's prior records. Compare *Mathis*, 136 S. Ct. at 2256-2257, with *Gundy*, 842 F.3d at 1164-1168; see *Gundy*, 842 F.3d at 1170 (J. Pryor, J., dissenting) (agreeing that the majority had applied the correct framework).

In doing so, *Gundy* correctly found Georgia's burglary statute to be divisible. The statute is phrased in the disjunctive, with three categories of locations, two of which themselves include a series of specific locations: (1) "the dwelling house of another"; (2) "any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the dwelling of another"; or (3) "any other building, railroad car, aircraft or any room or any part thereof." Ga. Code Ann. § 26-1601 (Supp. 1977). Contrary to petitioner's arguments (Pet. 22-25), that statutory language strongly suggests that each locational alternative is an element defining a separate crime, not a means of committing a single crime; otherwise, the statute simply would have included all of the locations in a single list. See *Gundy*, 842 F.3d at 1167 ("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."); cf. *Mathis*, 136 S. Ct. at 2249 (observing that a statute "that lists multiple elements disjunctively" is divisible). *Gundy* also explained how the text of the Georgia burglary statute differs from the text of both the Iowa statute that this Court found to be indivisible in *Mathis* and an Alabama statute that the court of appeals had found to be indivisible in *United States* v. *Howard*, 742 F.3d 1334, 1348-1349 (11th Cir. 2014). *Gundy*, 842 F.3d at 1165-1166.

Georgia case law confirms *Gundy*'s understanding of the Georgia burglary statute. In *DeFrancis* v. *Manning*, 271 S.E.2d 209 (1980), the Georgia Supreme Court explicitly found "that the vehicle [burglarized] was designed as a dwelling was an essential element of the offense." *Id.* at 210. Petitioner contends (Pet. 20) that the Georgia Supreme Court's holding in *DeFrancis* is confined to the pleading and proof requirements for burglary of a truck, which is only covered by the statute if the truck is designed as a dwelling. But the court of appeals in *Gundy* did not err in recognizing that what the Georgia Supreme Court "said" in *DeFrancis* "and what [it] mean[t] are one and the same," *Mathis*, 136 S. Ct. at 2254: that the specified location and its use as a dwelling was an "essential element of the offense" of burglary. *DeFrancis*, 271 S.E.2d at 210.

"Indictment[s]" and "jury instructions" also "indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements." *Mathis*, 136 S. Ct. at 2257. The Sixth Circuit explained in *Richardson* v. *United States*, 890 F.3d 616, cert. denied, 139 S. Ct. 349 (2018), that its examination of multiple indictments revealed that "[e]ach indictment references only one of the several alternative locations listed in Georgia's burglary statute." *Id.* at 629; see *Gundy*, 842 F.3d at 1167. Likewise, a "'peek'" at petitioner's indictment reveals that it "refer[s to] one alternative [location] to the exclusion of all others," *Mathis*, 136 S. Ct. at 2256-2257 (citation omitted), charging that he "without authority, enter[ed] into a certain building and liquor storage room * * * with intent to commit a theft therein." 16-cv-1143 D. Ct. Doc. 19-8, at 3 (June 9, 2017); see Pet. 25 (acknowledging that "[petitioner's] Georgia indictment" identified "a single location from a

statutory list"). And because that location naturally indicates a "building or other structure," the court of appeals correctly determined that the elements of petitioner's prior conviction constituted generic burglary for purposes of the ACCA. Pet. App. 7a; accord *Gundy*, 842 F.3d at 1167-1169 (determining that conviction for burglary of "building[] housing a business" was a conviction for generic burglary).

Petitioner contends (Pet. 20-22, 25) that *Gundy* erroneously focused on indictments, and asserts that Georgia cases concerning jury instructions suggest that the jury need not unanimously agree on a burglary location in order to find guilt. Petitioner focuses (Pet. 18, 20, 22) on *Hart* v. *State*, in which the Georgia Court of Appeals stated that a jury instruction allowing the jury to find entry into either a "building or dwelling house" was "sufficient to inform the jury of the essential elements of the offense." 517 S.E.2d 790, 792-793 (1999). But while *Hart* and other Georgia Court of Appeals cases on which the *Gundy* dissent relied are precedential under state law, they cannot supersede a decision of the Georgia Supreme Court. Moreover, petitioner has not cited a case holding that an indictment may charge a generic burglary (*e.g.*, dwelling, building, or structure), but that a jury can instead find a defendant guilty of a non-generic burglary (*e.g.*, watercraft); nor has he identified a case holding that a jury instruction may charge both a generic burglary and a non-generic burglary without requiring unanimity on the locational element.

2. Every court of appeals to have considered the "virtually identical," Pet. App. 7a, versions of the Georgia burglary statute in effect between 1977 and 2012

agrees that those versions are divisible as to the locational element. See *Richardson*, 890 F.3d at 629; *Gundy*, 842 F.3d at 1166-1168; *United States* v. *Martinez-Garcia*, 625 F.3d 196, 198 (5th Cir. 2010). Petitioner asserts (Pet. 11, 13-19) that those decisions conflict with the Fourth Circuit's decision in *United States* v. *Cornette*, 932 F.3d 204 (2019). Petitioner, however, overstates the conflict. The Fourth Circuit did not consider the same version of the Georgia burglary statute that is at issue here. Rather, *Cornette* involved a burglary conviction under the 1968 version of the Georgia burglary statute. *Id.* at 214 (citing Ga. Code Ann. § 26-1601 (1968)); see *id.* at 211 ("We must first determine whether Georgia's burglary statute at the time of Cornette's 1976 conviction is divisible or indivisible.").

Although that version of the Georgia burglary statute is not substantially different from the version under which petitioner was convicted, compare Ga. Code Ann. § 26-1601 (1968), with *id.* § 26-1601 (Supp. 1977), because the divisibility analysis under *Mathis* turns in part on the statutory text and state court decisions interpreting that text, see 136 S. Ct. at 2256-2257, the Fourth Circuit's decision in *Cornette* does not create a square conflict with the court of appeals' decision here. Indeed, *Cornette* refused to consider the Supreme Court of Georgia's decision in *DeFrancis*, and other Georgia appellate decisions, in part because they were issued after the defendant's conviction there. See *Cornette*, 932 F.3d at 215 (declining to rely on *DeFrancis*, *supra*, and relying on *Hayes* v. *State*, 186 S.E.2d 435 (Ga. Ct. App. 1971), which was subsequently overturned in *Massey* v. *State*, 234 S.E.2d 144 (Ga. Ct. App. 1977)).

Even if a clear conflict existed between *Cornette* and the decision below, such a conflict would not warrant

this Court's review. The court of appeals here applied the correct test under *Mathis* to a statute of a State within its geographic jurisdiction, and any disagreement with the Fourth Circuit on the classification of that offense is unlikely to affect a significant number of cases. Nor would addressing disagreement about the proper application of *Mathis* to one specific state statute—which, at bottom, turns on a question of state law—be likely to provide meaningful general guidance to the lower courts in their application of *Mathis* to other statutes.

This Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist.*, 542 U.S. at 16; see *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."). No reason exists to depart from that "settled and firm policy" here, particularly since the statute at issue was substantially amended in 2012. See 2012 Ga. Laws 907-908.

3. In any event, this case would be a poor vehicle for further review of the divisibility of the former Georgia burglary statute. Petitioner would not be entitled to relief even if he prevailed on his claim that his Georgia burglary conviction does not qualify as a violent felony under the ACCA.

First, as the district court determined, Pet. App. 16a-17a, petitioner cannot demonstrate that his sentence reflects *Johnson* error. *Johnson* "does not reopen *all* sentences increased by the [ACCA], as it has nothing to do with enhancements under the elements clause or the enumerated-crimes clause." *Potter* v. *United States*,

887 F.3d 785, 787 (6th Cir. 2018). Accordingly, for the reasons stated in the government's briefs in opposition to the petitions for writs of certiorari in *Couchman* v. *United States*, 139 S. Ct. 65 (2018) (No. 17-8480), and *King* v. *United States*, 139 S. Ct. 60 (2018) (No. 17-8280), a defendant who files a second or successive Section 2255 motion seeking to vacate his sentence based on *Johnson* must establish, through proof by a preponderance of the evidence, that his sentence in fact reflects *Johnson* error. To meet that burden, a defendant may point either to the sentencing record or to any case law in existence at the time of his sentencing proceeding that shows that it is more likely than not that the sentencing court relied on the now-invalid residual clause, as opposed to the elements or enumerated offenses clauses. See Br. in Opp. at 13-18, *King*, *supra* (No. 17-8280); see also Br. in Opp. at 12-17, *Couchman*, *supra* (No. 17-8480). As the district court observed, "[n]othing in the record prior to [petitioner's] sentencing hearing, in the sentencing hearing itself, or in the proceedings following [petitioner's] sentencing hearing establishes (or even suggests) that this Court relied upon the ACCA's residual clause when enhancing [petitioner's] sentence." Pet. App. 16a; see *ibid.* (noting that petitioner "has not cited, and this Court has not found, any 2005 (or earlier) caselaw holding or making it obvious that a majority of his prior convictions qualified as violent felonies only under the ACCA's residual clause.").[2]

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[2] As stated in the government's briefs in opposition in *Couchman*, *supra* (No. 17-8480), and *King*, *supra* (No. 17-8280), some inconsistency exists in the circuits' approach to the burden that a petitioner bringing a second or successive 2255 claim premised on *Johnson* must meet. Unlike the four other circuits that follow the approach of the court of appeals here, see *Beeman* v. *United States*,

The district court therefore did "not find that it relied on the ACCA's residual clause when sentencing [petitioner]." *Ibid.*

Second, even if his Georgia burglary conviction were not for a violent felony, petitioner would still have three qualifying ACCA predicates. In the district court and the court of appeals, the government contended that, in addition to the convictions on which the lower courts relied, three of petitioner's other prior convictions also qualified as ACCA predicates under either the elements clause or the enumerated offenses clause. See Gov't C.A. Br. 48-51; Pet. App. 20a. Although the lower courts' determination that petitioner's Georgia burglary conviction (along with his Florida robbery with a firearm and Georgia armed robbery convictions, see Pet. App. 7a-8a, 17a-18a) qualifies as a violent felony

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871 F.3d 1215 (11th Cir. 2017), cert. denied, 139 S. Ct. 1168 (2019), the Third, Fourth and Ninth Circuits have interpreted the phrase "relies on" in 28 U.S.C. 2244(b)(2)(A)—which provides that a claim presented in a second or successive post-conviction motion shall be dismissed by the district court unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable," *ibid.*; see 28 U.S.C. 2244(b)(4), 2255(h)—to require only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." *United States* v. *Winston*, 850 F.3d 677, 682 (4th Cir. 2017); see *United States* v. *Peppers*, 899 F.3d 211, 221-224 (3d Cir. 2018); *United States* v. *Geozos*, 870 F.3d 890, 896-897 (9th Cir. 2017); see also Br. in Opp. at 17-19, *Couchman*, *supra* (No. 17-8480); Br. in Opp. at 16-18, *King*, *supra* (No. 17-8280). As the government has explained, however, further review of that inconsistency is unwarranted. See Br. in Opp. at 17-19, *Couchman*, *supra* (No. 17-8480); Br. in Opp. at 16-18, *King*, *supra* (No. 17-8280). This Court has recently and repeatedly denied review of this issue. See Br. in Opp. at 9 n.2, *McKenzie* v. *United States*, No. 19-8597 (Nov. 6, 2020) (citing 34 cases).

made it unnecessary for them to consider petitioner's additional convictions, their existence makes it unlikely that petitioner could obtain relief. See *id.* at 6a n.5, 17a n.10 (district court and court of appeals found that they could consider all convictions listed in the presentence report).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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