

No. 17-6344

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IN THE SUPREME COURT OF THE UNITED STATES

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JERRY N. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals correctly denied a certificate of appealability after the district court dismissed petitioner's motion under 28 U.S.C. 2255(a) as procedurally barred and denied his motion to alter or amend its judgment.

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OPINIONS BELOW

The court of appeals' denial of a certificate of appealability (Pet. App. A1) is unreported. The orders of the district court (Pet. App. C1-C8) are unreported. A prior decision of the court of appeals is not published in the Federal Reporter but is reprinted at 323 Fed. Appx. 479.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2017. A petition for rehearing was denied on July 20, 2017 (Pet. App. B1). The petition for a writ of certiorari was filed on

October 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

Following a guilty plea in the United States District Court for the Western District of Missouri, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. C1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at C2. The court of appeals affirmed. 323 Fed. Appx. 479. Seven years later, petitioner filed a motion to vacate or modify his sentence under 28 U.S.C. 2255(a). The district court denied the motion and denied a certificate of appealability (COA). Pet. App. C1-C8. The court of appeals denied petitioner's application for a COA. Id. at A1.

1. In 2005, petitioner called police and reported that he was being watched. Presentence Investigation Report (PSR) ¶ 8. When police arrived at petitioner's home, they saw petitioner in his backyard with a loaded rifle. Ibid. After police took the rifle from petitioner, petitioner attempted to pick up a shotgun, which police also secured. PSR ¶ 9. Petitioner confirmed that he knew that he was not permitted to possess firearms due to his prior felony convictions. PSR ¶ 8.

2. A grand jury in the Western District of Missouri charged petitioner with possession of a firearm by a felon, in violation

of 18 U.S.C. 922(g)(1). PSR ¶ 1. Petitioner pleaded guilty, without a plea agreement. PSR ¶ 4.

a. A conviction for violating Section 922(g)(1) exposes the offender to a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), requires a mandatory minimum sentence of 15 years of imprisonment and authorizes a maximum sentence of life. 18 U.S.C. 924(e)(1); see Custis v. United States, 511 U.S. 485, 487 (1994). The ACCA defines a "violent felony" to include any offense that is punishable by a term of imprisonment exceeding one year that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(1)(B)(i); (2) "is burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. 924(e)(1)(B)(ii); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another," ibid. These clauses are often called the elements clause, the enumerated-crimes clause, and the residual clause, respectively.

b. Petitioner's PSR characterized him as an armed career criminal under the ACCA based on three qualifying prior convictions in Missouri state court: a 1977 conviction for burglary, a 1988

conviction for manufacturing marijuana, and a 1992 conviction for first-degree sexual abuse. Pet. App. C1-C2; PSR ¶¶ 24, 28, 30, 32. Petitioner did not object to his classification as an armed career criminal. No. 08-1027 Pet. C.A. Br. 9-14. The district court sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. C2. Petitioner then appealed his classification as an armed career criminal, and petitioner's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). No. 08-1027 Pet. C.A. Br. 7.

c. On April 24, 2009, the court of appeals affirmed. 323 Fed. Appx. at 481. The court concluded that petitioner's Missouri burglary conviction qualified as a violent felony under Section 924(e)'s enumerated-crimes clause because it satisfied the generic definition of burglary under this Court's decision in Taylor v. United States, 495 U.S. 575 (1990). 323 Fed. Appx. at 480-481. It also concluded that petitioner's first-degree sexual abuse conviction qualified as a violent felony under Section 924(e)'s force clause "because the statute of conviction had as an element the use of physical force against another person." Id. at 481. Finally, it concluded that petitioner's "conviction for manufacturing marijuana qualified as a serious drug offense." Ibid. The court accordingly held that petitioner had been properly designated an armed career criminal based on three qualifying convictions. Ibid.

3. On June 26, 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the residual clause of the ACCA's definition of violent felony is void for vagueness. Id. at 2557. The Court explained 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 2563. The Court later held in Welch v. United States, 136 S. Ct. 1257 (2016), that Johnson's holding with respect to the residual clause is a substantive rule that applies retroactively to prisoners seeking collateral relief from ACCA sentences. Id. at 1265.

a. On May 13, 2016, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255(a). D. Ct. Doc. 1. He argued that his burglary and sexual abuse convictions had been treated as qualifying ACCA predicates under the residual clause and that, after Johnson and Welch, he no longer had three qualifying predicate convictions to support the application of the ACCA sentencing enhancement. Id. at 5-6. After petitioner was appointed counsel, he filed an amended motion to correct his sentence under Section 2255. D. Ct. Doc. 5 (May 18, 2016). The amended motion argued that his prior conviction for manufacturing marijuana "is not and never has been" a "serious drug offense" under the ACCA and that his first-degree sexual abuse conviction does not "have as an element the use, threatened use, or attempted

use of physical force against the person of another.” Id. at 4-5.

The district court denied the amended motion. The court concluded that the motion was timely because it had been “filed within one year of the Supreme Court’s decision in Johnson.” Pet. App. C2. But the court held that petitioner’s contention that his sexual abuse conviction did not qualify under the ACCA’s elements clause was “procedurally barred because the Eighth Circuit already decided this issue on direct appeal.” Ibid. It also observed that petitioner’s reply brief had explicitly withdrawn his argument that his marijuana conviction was not a serious drug offense. Id. at C2 n.1. The court denied a COA. Id. at C3.

b. Petitioner moved to amend the district court’s judgment. D. Ct. Doc. 12 (Sept. 6, 2016). The court denied petitioner’s motion to amend the judgment but noted that petitioner “seems to argue his burglary conviction [also] does not qualify as an ACCA predicate offense.” D. Ct. Doc. 17, at 2 (Oct. 17, 2016). It explained that the issue “was not included in Petitioner’s amended motion to vacate or his motion to alter or amend” and thus “was not properly before this Court.” Ibid. Nevertheless, the court ordered supplemental responses to address the issue “[i]n the interest of achieving a just result.” Ibid.

c. The district court ultimately issued a third order, which rejected petitioner’s claim that his burglary conviction was not a violent felony under the ACCA. Pet. App. C4-C8. Petitioner



had been convicted of second-degree burglary, in violation of Mo. Rev. Stat. § 560.070 (1969), which prohibited “breaking and entering any building \* \* \* or any booth or tent, or any boat or vessel, or railroad car \* \* \* , with the intent to steal or commit [a] crime therein.” Pet. App. C7. The court determined that the statutory targets of the burglary -- i.e., a building, booth or tent, boat, or railroad car -- were alternative elements of separate offenses, not variant means of committing a single offense. Id. at C7-C8. It relied on circuit precedent that came to the same conclusion under the current Missouri second-degree burglary statute. See United States v. Sykes, 844 F.3d 712, 715 (8th Cir. 2016), petition for cert. pending, No. 16-9604 (filed June 14, 2017). Because petitioner had been convicted of burglary of a building, the court concluded that his conviction matched the generic definition of burglary and was therefore a crime of violence under the ACCA. Pet. App. C8.

4. The court of appeals, after “carefully review[ing] the original file of the district court,” denied petitioner’s application for a COA. Pet. App. A1. It also denied his petition for rehearing en banc. Id. at B1.

#### ARGUMENT

Petitioner contends (Pet. 3-20) that the court of appeals should have issued a certificate of appealability to determine whether his Missouri convictions for burglary and sexual abuse qualify as “violent felon[ies]” under the ACCA, 18 U.S.C. 924(e).

The court of appeals correctly declined to issue a COA, as petitioner's Section 2255 motion is procedurally barred. Although petitioner asserts that his motion is timely in light of this Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), the application of the ACCA in his case did not rest on the ACCA residual clause invalidated in that decision. Johnson thus cannot provide the basis for relitigating other ACCA arguments six years after petitioner's conviction became final. In any event, the posture of this case makes it a poor vehicle for resolving any issue beyond the narrow one of whether petitioner is entitled to a COA. Plenary review is therefore unwarranted.

Nonetheless, the government agrees that pending en banc proceedings in the Eighth Circuit may determine whether petitioner remains eligible for an ACCA sentence. If those proceedings make clear that he is no longer eligible, the government would not oppose relief. The government therefore suggests that the Court grant the petition for a writ of certiorari for the limited purpose of vacating the court of appeals' judgment and remanding for further proceedings in light of the position expressed in this brief.

1. A federal prisoner seeking to appeal the denial of a motion to vacate his sentence under Section 2255 must obtain a COA. 28 U.S.C. 2253(c)(1)(B). To obtain a COA, the prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Where a district court denies a

claim in a Section 2255 motion on procedural grounds, the prisoner must make two threshold showings: “[1] that jurists of reason would find it debatable whether the [Section 2255 motion] states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Gonzalez v. Thaler, 565 U.S. 134, 140-141 (2012) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The court of appeals correctly denied petitioner’s request for a COA here.

a. The district court properly concluded that petitioner’s motion is procedurally barred, although the court’s reasoning was incomplete. As the court explained, the “well-settled” general rule is that “claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255.” Pet. App. C2 (quoting United States v. Shabazz, 657 F.2d 189, 190 (8th Cir. 1981)). And petitioner’s arguments about both his sexual abuse conviction and his burglary conviction were raised and decided on direct appeal. On direct appeal, the court of appeals determined that petitioner’s sexual abuse conviction qualifies as an ACCA predicate under the elements clause. See 323 Fed. Appx. at 481 (concluding that “the statute of conviction had as an element the use of physical force against another person”). It also determined that petitioner’s burglary conviction qualifies as an ACCA predicate under the enumerated-crimes clause. See id.

at 480-481 (reasoning that petitioner's conviction for burglary of a building matched the definition of generic burglary).

b. Petitioner responds that the law-of-the-case doctrine does not apply if a Section 2255 motion is filed after "an intervening change in controlling authority." Pet. 11 (quoting Baranski v. United States, 515 F.3d 857, 861 (8th Cir.), cert. denied, 555 U.S. 1011 (2008)). That argument merely highlights a separate procedural flaw in petitioner's Section 2255 motion: Even if the law-of-the-case doctrine does not bar petitioner's claims, Section 2255's limitations period does.

The one-year period for filing a motion under Section 2255 runs from the latest of four dates. See 28 U.S.C. 2255(f). Ordinarily, the one-year deadline runs from "the date on which the judgment of conviction becomes final," 28 U.S.C. 2255(f)(1), which occurs at the "conclusion of direct review or the expiration of the time for seeking such review." Burton v. Stewart, 549 U.S. 147, 157 (2007) (per curiam) (citation omitted). Here, petitioner's conviction became final on July 8, 2009, ninety days after the court of appeals issued its decision, because petitioner did not seek further review before this Court. Petitioner's deadline to file a motion under Section 2255(f)(1) thus expired one year from that date. But where a prisoner relies on a ruling of this Court decided after his conviction became final, the limitations period runs from "the date on which the right asserted was initially recognized by th[is] Court, if that right has been

newly recognized \* \* \* and made retroactively applicable to cases on collateral review.” 28 U.S.C. 2255(f)(3); see Dodd v. United States, 545 U.S. 353, 357 (2005).

None of the Supreme Court decisions on which petitioner relies announce a “newly recognized” right that would render petitioner’s claim timely under Section 2255(f)(3). With respect to his sexual abuse conviction, petitioner contends (Pet. 12) that this Court’s decision in Curtis Johnson v. United States, 559 U.S. 133 (2010), provided guidance about the level of force sufficient to satisfy the ACCA’s elements clause. According to petitioner (Pet. 12), the prior decision in his case “is therefore subject to challenge based on the Supreme Court’s intervening decision [in Curtis Johnson].” But Curtis Johnson was decided in 2010, more than six years before petitioner filed his Section 2255 motion. See D. Ct. Doc. 1. It cannot form the basis of a timely Section 2255 motion. See 28 U.S.C. 2255(f)(3).

With respect to his burglary conviction, petitioner relies (Pet. 14, 16-18) on this Court’s recent decision in Mathis v. United States, 136 S. Ct. 2243 (2016), which was issued after he filed his Section 2255 motion. Mathis, however, did not “initially recognize” any retroactively applicable right, 28 U.S.C. 2255(f)(3), and therefore does not entitle a defendant originally sentenced under the enumerated-crimes clause to seek collateral relief. See United States v. Taylor, 672 Fed. Appx. 860, 864 (10th Cir. 2016) (“Mathis did not announce a new rule.”); cf. In re

Conzelmann, 872 F.3d 375, 376 (6th Cir. 2017) (in considering a second or successive Section 2255 motion, noting that “[t]he Court’s holding in Mathis was dictated by prior precedent (indeed two decades worth)”); Washington v. United States, 868 F.3d 64, 66 (2d Cir. 2017) (per curiam) (in considering a second or successive Section 2255 motion, noting that Mathis “did not reflect a new rule”).

In filing his Section 2255 motion more than six years after his judgment became final, petitioner asserts (Pet. 3-4) that the motion is timely under this Court’s decision in Johnson. But the Court in Johnson struck as unconstitutional the ACCA’s residual clause, not the other provisions defining a “violent felony” under 18 U.S.C. 924(e). See 135 S. Ct. at 2563 (noting that the “decision does 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”). On direct appeal, the court of appeals held that petitioner’s burglary conviction qualified as generic burglary, an enumerated offense under Section 924(e)(2)(B)(ii), and that his sexual abuse conviction “had as an element the use of physical force against another person” under the elements clause of Section 924(e)(2)(B)(i). 323 Fed. Appx. at 481. Because the court did not rely on the residual clause of the ACCA on direct appeal, Johnson does not apply and cannot serve as a basis for reviewing a Section 2255 motion more than six years past due. And because Johnson is inapplicable to petitioner’s case, the court of

appeals properly denied a COA because petitioner's motion is procedurally barred.\*

2. a. In any event, this case would be a poor vehicle for resolving the merits of the two arguments that petitioner presents: whether Missouri first-degree sexual abuse requires a sufficient degree of force under the ACCA's elements clause (Pet. 6-10) and whether Missouri's 1969 second-degree burglary statute is divisible (Pet. 13-20). Given the posture of this case -- in which petitioner seeks review of the court of appeals' denial of a COA -- the only question before this Court is whether "jurists of reason would find it debatable whether" the district court's procedural ruling was correct and whether petitioner's Section 2255 motion states a valid constitutional claim. Slack, 529 U.S. at 484.

b. In addition, this case would be a particularly poor vehicle for addressing petitioner's burglary argument because that argument was not properly preserved. Petitioner included that argument in neither his amended motion to correct his sentence nor

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\* The district court stated without explanation that petitioner's Section 2255 motion was timely because it was filed within one year of Johnson. Pet. App. C2. But that could be true only if petitioner's motion in fact relied on Johnson's invalidation of the ACCA's residual clause. As the court of appeals' original decision makes clear, his sentence did not ever depend on that clause. See 323 Fed. Appx. at 480-481. The district court's holding that petitioner's motion is procedurally barred, however, rests on essentially the same principles as a finding of untimeliness: Petitioner's Section 2255 motion repeats arguments that he made on direct appeal, and the Court's decision in Johnson does not disturb the court of appeals' decision on direct appeal.

his motion to alter or amend the district court's initial judgment denying his Section 2255 motion (though he did raise it in a pro se supplement to the latter motion). D. Ct. Doc. 17, at 2; see D. Ct. Doc. 13, at 2 (Sept. 23, 2016). The district court thus determined that the argument "was not properly before" it, though it nevertheless addressed the question "[i]n the interest of achieving a just result." D. Ct. Doc. 17, at 2.

3. Although this case does not warrant plenary review, the Court may wish to grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings. The question whether Missouri's current burglary statute is divisible under Mathis is now pending before the en banc Eighth Circuit. See United States v. Naylor, No. 16-2047. If the en banc court of appeals determines that the statute is not divisible, petitioner's conviction under an earlier version of the Missouri burglary statute might not qualify as an ACCA predicate. Were that the case, the government would not oppose relief, notwithstanding any timeliness or other procedural issues. See Wood v. Milyard, 566 U.S. 463, 474 (2012) (government may waive statute of limitations defense); see also, e.g., Sanchez v. United States, No. 06-CR-67-JRG, 2016 WL 4921029, at \*1 & n.2 (E.D. Tenn. Sept. 14, 2016) (granting relief where government waived statute of limitations defense under Section 2255(f)(3)); Jolly v. United States, No. 16-cv-4-RJC, 2016 WL 1614409, at \*2 & n.1 (W.D.N.C. Apr. 22, 2016) (granting relief where government stated that even



if petition were untimely, it would waive statute of limitations defense).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

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FEBRUARY 2018