

No. 17-7157

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LEE SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to post-conviction relief based on Johnson v. United States, 135 S. Ct. 2551 (2015), where the lower courts determined that he was sentenced under a different clause of the definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), from the one this Court invalidated in Johnson.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 871 F.3d 1122. A prior decision of the court of appeals is not published in the Federal Reporter but is reprinted at 158 Fed. Appx. 942. The opinion of the district court (Pet. App. B1-B33) is not published in the Federal Supplement but is available at 2016 WL 10677327.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2017. The petition for a writ of certiorari was filed on

December 15, 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 District of Wyoming, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 172 months and 11 days of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed, 158 Fed. Appx. 942, and this Court denied a petition for a writ of certiorari, 547 U.S. 1050. In 2016, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. B1. The district court denied petitioner's motion and denied a certificate of appealability (COA). Id. at B1-B33. The court of appeals granted a COA and affirmed. Id. at A1-A15.

1. In March 2004, petitioner and two accomplices stole a truck and committed a string of vehicle burglaries in Cheyenne, Wyoming. Presentence Investigation Report (PSR) ¶ 3. Petitioner stole a variety of items during those burglaries, including a loaded .38 caliber revolver that he repeatedly fired in an effort to break a chain attached to the stolen truck. Ibid. Police later recovered the revolver at petitioner's home. Ibid.

2. A federal grand jury charged petitioner with possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1).

Indictment 1. Petitioner pleaded guilty to that offense. Pet. App. A2.

The default sentencing range for a violation of Section 922(g)(1) is zero to ten years of imprisonment. 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), prescribes a sentence of 15 years to life in prison if the defendant has at least three prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as an offense punishable by more than a year in prison 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.

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

The Probation Office determined that petitioner was subject to an enhanced sentence under the ACCA. PSR ¶¶ 15, 86. The Probation Office noted that petitioner had a prior Wyoming conviction for delivery of marijuana, which qualified as a serious drug offense, and two Wyoming convictions for residential

burglary, which qualified as violent felonies. PSR ¶¶ 30, 36, 48. The Probation Office did not specify, however, whether petitioner's burglary convictions qualified as ACCA predicate offenses under the enumerated offenses clause (which includes "burglary") or the residual clause.

Petitioner objected to the application of the ACCA based on Apprendi v. New Jersey, 530 U.S. 466 (2000), on the ground that his prior convictions had not been alleged in the indictment and proven to a jury beyond a reasonable doubt. Pet. App. A3. He did not, however, object to the Probation Office's determination that Wyoming burglary qualifies as a violent felony. Ibid.

The district court accepted the Probation Office's determination that petitioner was an armed career criminal and overruled his Apprendi-based objection. Sent. Tr. 8, 10-11. The court sentenced petitioner to 180 months of imprisonment minus seven months and 19 days petitioner had already served on a related state sentence, for a total federal sentence of 172 months and 11 days. Id. at 11-12; see Judgment 2.

The court of appeals affirmed. 158 Fed. Appx. 942. This Court denied a petition for a writ of certiorari. 547 U.S. 1050.

3. In 2015, this Court held in Johnson v. United States, 135 S. Ct. 2551, that the ACCA's residual clause is unconstitutionally vague. Id. at 2557. 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 2563. The Court later held in Welch, supra, that Johnson announced a substantive rule that applies retroactively on collateral review. 136 S. Ct. at 1265.

In 2016, petitioner moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. A4; see 1 C.A. Record on Appeal (ROA) 39-56. Petitioner argued that Wyoming burglary could not qualify as a violent felony under the ACCA's residual clause following Johnson. 1 ROA 42-44. He further argued that, even if the enumerated offenses clause would have provided a basis for classifying Wyoming burglary as a violent felony at the time he was sentenced, that clause no longer applied because Wyoming's burglary statute is broader than "generic" burglary under the ACCA and, under the reasoning of this Court's intervening decision in Descamps v. United States, 570 U.S. 254 (2013), it is not "divisible" into separate offenses for purposes of determining whether his convictions were for generic burglary. 1 ROA 44-48.

4. The district court denied petitioner's motion. Pet. App. B1-B33.

a. The district court determined, as a threshold matter, that petitioner's motion was untimely. Pet. App. B13-B18. A federal prisoner generally must file a motion for post-conviction relief within one year of the date on which his "judgment of conviction becomes final." 28 U.S.C. 2255(f)(1). Petitioner's conviction became final when this Court denied his petition for a

writ of certiorari in 2006, and thus the district court concluded that petitioner's motion was several "years too late." Pet. App. B17-B18.

The district court rejected petitioner's contention that, because he filed his motion within a year of the decision in Johnson, it was timely under the statute-of-limitations exception for motions filed within one year of the date on which a "new[]," retroactively applicable right to relief "was initially recognized by the Supreme Court." 28 U.S.C. 2255(f)(3); see Pet. App. B14-B17. The court reasoned that Johnson invalidated only the ACCA's residual clause and that the record of petitioner's case "offer[ed] no basis whatsoever for the notion [that] the sentence [he] received was based on the ACCA's 'residual clause,' rather than its 'enumerated offenses clause.'" Pet. App. B14. The court noted, for example, that neither it nor the Probation Office had "made [any] reference to the residual clause" in finding that petitioner qualified as an armed career criminal. Id. at B15 (quotation marks omitted); see id. at B16. The court also observed that the PSR had treated petitioner's residential burglary convictions as violent felonies but did not classify a similar conviction for burglary of a car (see PSR ¶ 49) as a violent felony, which indicated an intent to draw a distinction between generic burglary of a home and non-generic burglary of a vehicle. Pet. App. B15; see Taylor v. United States, 495 U.S. 575, 599 (1990). That distinction would only have mattered, the court

explained, for purposes of determining whether petitioner's offenses qualified as "burglary" under the enumerated offenses clause. Pet. App. B15; see Taylor, 495 U.S. at 598-599.

The district court acknowledged that it had not "delve[d] into the intricacies" of whether petitioner's burglary offenses satisfied the enumerated offenses clause at sentencing. Pet. App. B16. It explained, however, that "such a discussion was not necessary" because petitioner did not object to classifying his burglary convictions as ACCA violent felonies. Ibid. Accordingly, because petitioner could not establish that he was sentenced under the residual clause, as opposed to the enumerated offenses clause, the court determined that he could not rely on Johnson as the start of a new one-year limitations period for filing his motion for collateral relief. Id. at B17, B20-B21.

b. The district court further determined that petitioner had procedurally defaulted his claims by failing to raise them on direct appeal. Pet. App. B21-B26. A prisoner may not obtain collateral review of a defaulted claim unless he shows "cause" for the default and "actual prejudice" from any error, or "actual innocence." Bousley v. United States, 523 U.S. 614, 622 (1998) (citations and quotation marks omitted). The court noted that, although petitioner purported to challenge his sentence under Johnson, "[t]he sine qua non of [his] motion is the argument" that Wyoming burglary "do[es] not meet the requirements of generic burglary" under the ACCA's enumerated offenses clause. Pet. App.

B22. The court held that petitioner could not demonstrate “cause” for failing to raise that claim on direct appeal because it was clearly available to him under longstanding precedent. Id. at B22-B23. The court also rejected petitioner’s reliance on the “actual innocence” exception in light of Tenth Circuit precedent establishing that a prisoner cannot be actually innocent of a noncapital sentence. Id. at B23-B24 (citing cases).

c. Finally, the district court determined that petitioner’s challenge to his ACCA sentence failed on the merits because his burglary convictions did in fact qualify as violent felonies under the enumerated offenses clause. Pet. App. B26-B33. The court observed that, under Tenth Circuit precedent, Wyoming’s burglary statute identifies two divisible offenses that qualify as generic burglary (burglary of a building or occupied structure) and one offense that does not (burglary of a vehicle). Id. at B27-B28 (citing United States v. Gonzales, 558 F.3d 1193, 1197-1198 (10th Cir.), cert. denied, 558 U.S. 864 (2009)). Petitioner had not objected to the Probation Office’s determination that he was convicted of the former type of burglary, and thus the court determined that he had conceded that his prior convictions were for generic versions of the offense. Id. at B31-B33.

5. The court of appeals granted a COA and affirmed on the merits. Pet. App. A1-A15.

a. As an initial matter, the court of appeals took the view that petitioner’s motion was timely under 28 U.S.C. 2255(f)(3).

Pet. App. A5-A6. The court interpreted that subsection to require only that a motion for post-conviction relief "invoke [a] newly recognized right." Id. at A6 (quotation marks omitted). The court concluded that, because petitioner had invoked "the right established in Johnson, to be free from a sentence purportedly authorized by the unconstitutionally vague residual clause," and had filed his motion within a year of the date on which Johnson was decided, his claim was timely even if his sentence did not in fact rely on the residual clause. Id. at A7.

The court of appeals also took the view that, although petitioner had procedurally defaulted his claims by failing to raise them on direct appeal, the default was excusable. Pet. App. A7-A10. The court concluded that this Court's constitutional holding in Johnson was sufficiently novel that petitioner would not have had "cause" to raise the issue at the time of his direct appeal and that his claim to have been sentenced above the otherwise-applicable statutory maximum was sufficient to establish prejudice. Id. at A9-A10. The court did not address the district court's determination that petitioner lacked cause for failing to raise on direct appeal his separate claim that Wyoming burglary does not qualify as a violent felony under the ACCA's enumerated offenses clause.

The court of appeals determined, however, that petitioner's claim "fails on the merits because, after examination of the record and the relevant background legal environment, it is apparent that

he was not sentenced based on the ACCA's residual clause that was invalidated in Johnson." Pet. App. A2; see id. at A11-A12 ("agree[ing] with" the district court's finding that, "as a matter of historical fact, * * * it did not apply the ACCA's residual clause"). Like the district court, the court of appeals observed that neither the district court nor the Probation Office had identified the ACCA's residual clause as a basis for petitioner's sentence, and that the PSR strongly suggested that petitioner's sentence depended on application of the enumerated offenses clause by drawing an apparent distinction between generic residential burglary and non-generic vehicle burglary, treating only the former as an ACCA predicate offense. Id. at A11. While the district court had relied on those facts to find that petitioner's Johnson claim was untimely, the court of appeals relied on them to show the claim's lack of merit. Id. at A11-A12.

The court of appeals further noted that the law at the time of petitioner's sentencing supported application of the enumerated offenses clause. Pet App. A12. As the court explained, a district court's determination that a defendant qualifies for an enhanced sentence under the ACCA is "a finding that 'rests largely on legal conclusions,'" and it is therefore "'possible to determine that a sentencing court did not rely on the residual clause -- even when the sentencing record alone is unclear -- by looking to the relevant background legal environment at the time of sentencing.'" Ibid. (quoting United States v. Geozos, 870 F.3d 890, 896 (9th

Cir. 2017)). The court observed that petitioner's sentencing "occurred against the backdrop" of this Court's decision in Taylor, supra, which courts had interpreted to permit consideration of the records of a prior conviction when applying the enumerated offenses clause if the statute of conviction defined both generic and non-generic offenses. Id. at A13; see Taylor, 495 U.S. at 602. Petitioner was convicted under a Wyoming statute that covered both generic burglary of "a building [or] occupied structure" and non-generic burglary of a "vehicle," Wyo. Stat. Ann. § 6-3-301(a) (West 1983), and thus "it would have been permissible for the district court to examine the underlying charging documents and/or jury instructions to determine if [petitioner] was charged only with burglary of buildings." Pet. App. A14. The court noted that "the PSR * * * actually did just that, without any objection" from petitioner, and thus "there would have been little dispute at the time of [petitioner's] sentencing that his two Wyoming burglary convictions involving occupied structures fell within the scope of the ACCA's enumerated crimes clause." Id. at A13-A14.

b. Judge McHugh concurred in the result. Pet. App. A16-A20. Judge McHugh reasoned that a Johnson-based Section 2255 motion is untimely "where the record reveals that the petitioner is not asserting the right recognized in Johnson -- the right not to be sentenced as an armed career criminal under the residual clause of the ACCA." Id. at A19. Nonetheless, she would have held that petitioner's motion was timely because "he has asserted

a right that may have been recognized by the Supreme Court in Johnson.” Ibid. Judge McHugh also agreed “with the majority’s analysis concerning [petitioner’s] inability to prevail on the merits” of his claim because the relevant legal background at the time of sentencing “leaves no doubt that [his] ACCA enhancement was based on the sentencing court’s application of the enumerated offenses clause.” Id. at A20.

ARGUMENT

Petitioner contends (Pet. 8-20) that the court of appeals erred by requiring him to show that he was sentenced under the ACCA’s residual clause, as opposed to the enumerated offenses clause, in order to obtain relief under Johnson v. United States, 135 S. Ct. 2551 (2015). The court’s decision is correct and does not conflict with decisions of any other court of appeals. The petition for a writ of certiorari should be denied.

1. A federal prisoner generally may not obtain post-conviction relief unless he establishes that his sentence was “imposed in violation of the Constitution or laws of the United States.” 28 U.S.C. 2255(a). That stringent standard reflects the principle that collateral review “is an extraordinary remedy” that “will not be allowed to do service for an appeal.” Bousley v. United States, 523 U.S. 614, 621 (1998) (citation omitted). After the completion of direct review in a criminal case, “a presumption of finality and legality attaches to the conviction and sentence,” Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (citation omitted),

and courts are "entitled to presume" that the defendant's sentence is lawful, United States v. Frady, 456 U.S. 152, 164 (1982). That "presumption of regularity * * * makes it appropriate to assign a proof burden to the defendant" on collateral review. Parke v. Raley, 506 U.S. 20, 31 (1992); see Hawk v. Olson, 326 U.S. 271, 279 (1945) (explaining that a prisoner necessarily "carries the burden in a collateral attack on a judgment").

2. The limitations on post-conviction relief, and the prisoner's burden of proof in that context, preclude an approach that would grant relief from an ACCA sentence based on Johnson without requiring the prisoner to show that his sentence was actually the result of Johnson error. Johnson invalidated the ACCA's residual clause, but it "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." 135 S. Ct. at 2563. Whether viewed as a question of timeliness, as the district court did (Pet. App. B13-B18), or as a matter that affects the underlying merits of the claim, as the court of appeals did (id. at A11-A14), a prisoner who fails to prove that his ACCA sentence actually depended on application of the residual clause fails to carry his burden of demonstrating a constitutional violation that could support collateral relief. Because petitioner failed to make that showing -- indeed, the lower courts found "as a matter of historical fact" that his sentence was based

on the enumerated offenses clause and not the residual clause, id. at A11; see id. at A11-A12, B14-B17 -- relief was properly denied.

Petitioner's contrary arguments upend the burden of proof on collateral review. He contends (Pet. 5, 10) that because a sentencing court "may have" relied on the ACCA's residual clause to classify Wyoming burglary as a violent felony, he should be granted resentencing to avoid the "possibility" of Johnson error. But that contention ignores the stringent limitations on post-conviction relief. Petitioner must prove that his sentence was "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. 2255(a). In the context of a Johnson claim, that standard requires a showing that he was sentenced under the unconstitutional residual clause. If he was instead sentenced under the enumerated offenses clause, which Johnson explicitly "d[id] not call into question," 135 S. Ct. at 2563, then he can show no fundamental error warranting collateral relief.

Petitioner asserts (Pet. 13-14) that, before Johnson, "sentencing judges did not need to rely on" the ACCA's other clauses because "relying on the residual clause would have been the easier and more available route" to impose an ACCA sentence. That assertion is incorrect. Petitioner's prior convictions were for burglary, which is an enumerated offense. 18 U.S.C. 924(e) (2) (B) (ii). As the pre-Johnson experience in this Court and the Tenth Circuit demonstrates, the most natural basis for classifying a burglary conviction as an ACCA violent felony was to

classify it as "burglary" under the enumerated offenses clause. See, e.g., Taylor v. United States, 495 U.S. 575, 598-599 (1990) (reviewing classification of convictions for Missouri burglary); United States v. King, 422 F.3d 1055, 1058 (10th Cir. 2005) (same for New Mexico commercial burglary), cert. denied 546 U.S. 1120 (2006); United States v. Hill, 53 F.3d 1151, 1155 (10th Cir.) (en banc) (same for Oklahoma second-degree burglary), cert. denied, 516 U.S. 900 (1995). The Tenth Circuit had, in fact, taken that approach with respect to the Wyoming burglary statute under which petitioner was convicted. See United States v. Barney, 955 F.2d 635, 640 (10th Cir. 1992) (holding that, although Wyoming burglary is broader than generic burglary, the defendant's conviction satisfied the enumerated offenses clause because the charging document established that he pleaded guilty to burglarizing a "building," thus "fulfill[ing] the Taylor definition" of generic burglary); see also United States v. Gonzales, 558 F.3d 1193, 1197 (10th Cir.) (same), cert. denied 558 U.S. 864 (2009). And as the lower courts expressly found, the sentencing court in this case applied the enumerated offenses clause, not the residual clause, when it sentenced petitioner in 2005. Pet. App. A11-A12.

The fact that courts sometimes relied on the residual clause to conclude that specific burglary offenses qualified as ACCA predicates does not indicate that the residual clause was the "analytical path of least resistance" in every case. Pet. 16.

Some courts of appeals considered whether burglary offenses qualified under the residual clause only after determining that the relevant offense did not fall within the enumerated offenses clause. See, e.g., United States v. Coleman, 655 F.3d 480, 482-483 (6th Cir. 2011), cert. denied, 565 U.S. 1129 (2012); United States v. Mayer, 560 F.3d 948, 959-960 (9th Cir.), cert. denied, 558 U.S. 860 (2009). Analysis under the residual clause required courts to consider “whether the conduct encompassed by the elements of the offense, in the ordinary case, present[ed] a serious potential risk of injury to another” that was comparable to the risk posed by the enumerated offenses (including “burglary”), James v. United States, 550 U.S. 192, 208 (2007), overruled by Johnson, 135 S. Ct. at 2563, which were themselves “far from clear in respect to the degree of risk each poses,” Begay v. United States, 553 U.S. 137, 143 (2008). See Johnson, 135 S. Ct. at 2557-2558 (describing problems in comparing burglary offenses to residual clause). A determination that a particular crime qualified as “burglary” under the enumerated offenses clause often presented the more straightforward path to applying the ACCA.

Petitioner’s assertion that the court of appeals’ decision arbitrarily conditions relief on whether the sentencing court “uttered the magic words ‘residual clause,’” Pet. 16 (citation omitted), is incorrect. As the lower courts explained, a prisoner can meet his burden under Section 2255 to establish Johnson error if the record and “relevant background legal environment” at the

time of sentencing indicate that he was likely sentenced under the residual clause. Pet. App. A12. A prisoner may show, for example, that courts had classified his offense as an ACCA predicate under the residual clause, supporting an inference that the sentencing court did the same. He may also show that his offense could only have been treated as a violent felony under the residual clause because, under the law at the time, it would not have satisfied one of the other clauses. See, e.g., Sykes v. United States, 564 U.S. 1, 8 (2011) (analyzing Indiana felonious vehicle flight), overruled by Johnson, 135 S. Ct. at 2563.

In any event, it is not arbitrary to require a prisoner to satisfy the ordinary burden of proof when seeking collateral relief under Johnson. See, e.g., Dimott v. United States, 881 F.3d 232, 242 (1st Cir. 2018) ("Requiring habeas petitioners to establish -- by a preponderance of the evidence -- that they were sentenced pursuant to the residual clause does not lead to treating similarly situated defendants differently. Precisely the opposite: it is imposing a uniform rule."), petition for cert. pending, No. 17-1251 (filed Mar. 8, 2018). "What would be arbitrary is to treat Johnson claimants differently than all other [Section] 2255 movants claiming a constitutional violation." Beeman v. United States, 871 F.3d 1215, 1224 (11th Cir. 2017) (emphasis added).

3. Contrary to petitioner's contention (Pet. 8-13), the court of appeals' decision does not conflict with decisions of any other circuit. Petitioner identifies no court of appeals that

would necessarily grant relief where, as here, the record demonstrates that the classification of a prior burglary conviction was based on the enumerated offenses clause.

Petitioner's claim of a circuit conflict relies principally on the Fourth Circuit's decision in United States v. Winston, 850 F.3d 677 (2017), which involved a second-or-successive motion under Section 2255. Second-or-successive relief is not available unless (inter alia) a prisoner makes a threshold showing that his claim "relies on 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. 2244(b)(2)(A); see 28 U.S.C. 2255(h). In Winston, the court of appeals stated that, in the context of a Johnson claim, the phrase "relies on" requires only a showing that the prisoner's sentence "may have been predicated on application of the now-void residual clause." 850 F.3d at 682. The court determined that the record of the sentencing in Winston did not indicate "which clause of Section 924(e)(2)(B)" applied and, thus, the prisoner could make a showing that his claim "'relied on,' at least in part, the new rule of constitutional law announced in Johnson." Ibid.

This case, in contrast, involves a first Section 2255 motion challenging a sentence that the "district court found, as a matter of historical fact, * * * did not [depend upon] the ACCA's residual clause," and was instead based on the enumerated offenses clause. Pet. App. A11. The court of appeals "agree[d]" with that

finding based on its own review of the record. Id. at A12. Winston did not address such a situation, much less require that a motion for post-conviction relief be granted on such facts. Moreover, Winston's reasoning is based on since-rejected dicta from an Eleventh Circuit case involving a second-or-successive motion. Compare In re Chance, 831 F.3d 1335 (2016), with Beeman, 871 F.3d at 1221, 1228 n.3 (rejecting dicta in Chance); see also Dimott, 881 F.3d at 240 & n.6, 242 (same). No reason exists to assume that the Fourth Circuit would adhere to Winston's reasoning if presented with a case, like this one, involving the merits of a claim for relief on a first motion under Section 2255 where the record and applicable law indicate that the residual clause was not a basis for the prisoner's ACCA sentence.

Indeed, another allegedly conflicting decision on which petitioner relies (Pet. 12) "came to a similar conclusion" as Winston on the approach to second-or-successive motions but explicitly recognized that a prisoner cannot establish that his claim "relies on" Johnson for purposes of filing such a motion if the circumstances show that he was not in fact sentenced based on the residual clause. United States v. Geozos, 870 F.3d 890, 896 & n.6 (9th Cir. 2017). The court explained that "a claim does not 'rely on'" Johnson if a court finds, using both "the record before the sentencing court and the relevant background legal environment at the time of sentencing, that the sentencing court's ACCA determination did not rest on the residual clause." Ibid. The

court of appeals expressly adopted that reasoning in this case. See Pet. App. A12 (citing Geozos, 870 F.3d at 896). Although the Ninth Circuit in Geozos determined that the record and background legal environment in that case did not foreclose relief, 870 F.3d at 897, that judgment does not conflict with the court of appeals' factbound determination that relief was unwarranted in this case.

Finally, contrary to petitioner's contention (Pet. 11-12), the Eleventh Circuit's decision in Beeman is fully consistent with the decision below. The court there held that a prisoner is not entitled to post-conviction relief on a Johnson claim unless he can "show that -- more likely than not -- it was use of the residual clause that led to the sentencing court's enhancement of his sentence," a question that the court treated as one of "historical fact" to be resolved in light of the record and legal background at the time of sentencing. Beeman, 871 F.3d at 1222, 1224 n.5. The courts in this case resolved that question of historical fact adversely to petitioner. See Pet. App. A11-A14.

4. Petitioner contends (Pet. 20-21) that, even if his ACCA sentence depended on application of the enumerated offenses clause rather than the residual clause, he is still entitled to post-conviction relief because his Wyoming burglary convictions would not qualify as ACCA predicates "under today's law." He argues (Pet. 21) that Wyoming's burglary statute is categorically broader than the enumerated offense of generic burglary because it includes burglary of vehicles, and that the statute is not "divisible" under

Mathis v. United States, 136 S. Ct. 2243 (2016), because it sets forth “alternative means” of committing the offense rather than “alternative elements.” Id. at 2255.

Petitioner’s contention does not warrant review. First, his challenge to the application of the enumerated offenses clause is untimely. Petitioner’s claim would only be timely if it was filed within a year of “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.” 28 U.S.C. 2255(f)(3). Mathis, however, did not announce a new rule; rather, the Court explained that the distinction between elements and means on which petitioner relies was derived from a “straightforward” application of “more than 25 years” of precedent. 136 S. Ct. at 2257; see id. at 2247, 2251. As the courts of appeals have uniformly held, “Mathis is a clarification of existing rules rather than a new rule itself,” Arazola-Galea v. United States, 876 F.3d 1257, 1259-1260 (9th Cir. 2017) (citing cases), and thus it did not start a new limitations period under Section 2255(f)(3). Petitioner’s reliance in his Section 2255 motion on Descamps v. United States, 570 U.S. 254 (2013), is similarly misplaced. See 1 ROA 44-48. Petitioner filed his motion several years after Descamps was decided, and in any event, that decision (like Mathis) merely clarified the circumstances in which a statute may be treated as

divisible under existing precedent, rather than announcing a new rule. 570 U.S. at 260-264.

Second, petitioner procedurally defaulted his claim by failing to raise it on direct appeal. See Bousley, 523 U.S. at 621-623. Petitioner cannot demonstrate “cause” for that default. Id. at 622 (citation omitted). Because the holdings of Mathis and Descamps were consistent with longstanding precedent, petitioner cannot show that a challenge based on the principles stated in those opinions would have been “so novel” at the time of his direct appeal “that its legal basis [was] not reasonably available” to him. Ibid. (citation omitted). And although petitioner’s challenge would not likely have succeeded in light of the Tenth Circuit’s decision in Barney, supra, this Court has long held that “futility cannot constitute cause.” Bousley, 523 U.S. at 623 (citation omitted). Nor can petitioner satisfy the “actual innocence” exception to procedural default. Ibid. Even assuming that a prisoner could in some circumstances be “actually innocent” of a noncapital sentence, cf. Dretke v. Haley, 541 U.S. 386, 391-392 (2004) (declining to resolve that question), petitioner cannot make such a showing because, as discussed below, his prior convictions for Wyoming burglary were properly characterized as ACCA predicate offenses.

Third, Wyoming’s burglary statute is divisible under Mathis. In Mathis, this Court instructed lower courts to consult three sources in determining whether a statute lists alternative

elements (which would make it divisible) or means (which would make it indivisible): (1) the statutory text, (2) "authoritative sources of state law," and (3) the record of the defendant's prior conviction. 136 S. Ct. at 2256-2257. At the time of petitioner's offense, Wyoming prohibited burglary of "a building, occupied structure or vehicle, or separately secured or occupied portion thereof." Wyo. Stat. Ann. § 6-3-301(a) (West 1983). In Collins v. State, 854 P.2d 688 (1993), the Wyoming Supreme Court held that the term "occupied structure" includes occupied vehicles, and thus the statute's separate reference to burglary of a "vehicle" "stands alone" as a distinct offense. Id. at 696. Consistent with that interpretation, the relevant pattern jury instruction indicates that a jury must find, as an element, the type of location that was burglarized. Wyo. Pattern Jury Instructions § 33.01A & Use Note (2009) (Amended 2014) (requiring the jury to find that the defendant entered or remained in "a [building] [occupied structure] [vehicle] [separately secured or occupied portion of a building, occupied structure or vehicle]," and instructing the court to use the "appropriate bracketed language").

Here, petitioner's convictions were for the distinct offense of burglarizing "buildings." See PSR ¶¶ 36, 48 (noting that petitioner was convicted of burglarizing two residences). Those

convictions therefore qualified as "burglary" under the ACCA. See Taylor, 495 U.S. at 598-599.¹

Fourth, and in any event, the underlying question of whether Wyoming's burglary statute is divisible does not warrant this Court's review because it is fundamentally a question of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). Nor does petitioner allege that the courts of appeals are in disagreement about whether Wyoming burglary is divisible after Mathis; indeed, to the government's knowledge, no court of appeals has yet squarely decided that question.²

¹ The court of appeals stated, in dicta, that Mathis "abrogated" the Tenth Circuit's earlier determination in Gonzales, supra, that Wyoming's burglary statute is divisible. Pet. App. A13 n.4. But the court did not explain why that was so, and in light of its determination that petitioner could not establish his entitlement to relief under Johnson -- the only claim the court found timely and not subject to procedural default -- the court had no reason to resolve in this case whether Wyoming law treats the location of a burglary as an element.

² Petitioner briefly argues (Pet. 19) that the court of appeals' decision "creates a separate and independent due process violation" because it causes a prisoner who does not qualify for the ACCA's mandatory minimum sentence to serve "more time than the law allows." As explained, petitioner is validly subject to an ACCA sentence, even under current law. In any event, petitioner did not raise a due-process challenge below, and this Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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