

NO. 17-7157

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL LEE SNYDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

I. Contrary To the Government's Argument, The Sentencing Record Is Completely Silent About What Clause Of The ACCA Was Used To Enhance Mr. Snyder's Sentence.

A quick look at the presentence report and the sentencing transcript (attached as Exhibit A) shows that the record is truly silent as to which clause of the Armed Career Criminal Act (ACCA) the sentencing court relied on. The presentence investigation report listed a number of Mr. Snyder's prior burglaries: two burglaries of buildings and one burglary of a van. The first two burglaries were counted as ACCA predicates; the third was not. The government's response (at 6) points this out in support of the district court's conclusion that the sentencing court was drawing "a distinction between generic burglary of a home and non-generic burglary of a vehicle." This, in turn, is significant (according to the government) because, under *Taylor v. United States*, 495 U.S. 575 (1990), vehicle burglaries are not ACCA predicates. But it would have been error to include Mr. Snyder's vehicle burglary as an ACCA predicate under *any* prong of the ACCA's violent felony definition.

The government also focuses on (at 6) the district court's observation that there was no explicit reference to the residual clause in either the sentencing transcript or the presentence investigation report. But the government acknowledges (at 7) that there is no mention of the enumerated offenses clause

either, noting that the district court admitted it had not “delve[d into the intricacies” of the enumerated clause analysis in any way. The fact that the district court failed to utter the magic words “residual clause” does not, by itself, establish that the residual clause had no effect on Mr. Snyder’s sentencing, because it did not utter the words “enumerated clause” either.

The legal conclusion that the *Snyder* panel reached based on this record was that Mr. Snyder’s sentence was not enhanced on the basis of the ACCA’s residual clause. The government latches on to one phrase from the *Snyder* panel’s decision that, in its view, is dispositive: the *Snyder* panel said that the district court had found, “as a matter of historical fact,” that the residual clause was not in play when Mr. Snyder was sentenced. *United States v. Snyder*, 871 F.3d 1122, 1128. (10th Cir. 2017). But the district court’s so-called “findings of fact” were predicated on the notion that a court only “applies” the residual clause for purposes of a *Johnson* claim where it explicitly references the residual clause—which embodies the very issue Mr. Snyder is asking this Court to review.

II. Contrary To the Government’s Argument, *Snyder* Is Directly At Odds With *Winston*.

The government’s contention (at 18-19) that *Winston v. United States*, 850 F.3d 677 (4th Cir. 2017) and *Snyder* do not conflict is untenable given the way that the two cases have been applied in the Fourth and Tenth Circuits

respectively. Although the panel decision in *Winston* did not go into detail about the sentencing record in that case, the principle set out in *Winston* has been applied to allow petitioners in Mr. Snyder's position to be resentenced under a non-ACCA sentence in substantially identical circumstances.

In *Cade v. United States*, 276 F. Supp. 3d 502, 507–08 (D.S.C. 2017), for example, a district court granted relief to a petitioner with prior burglary convictions even though the government argued that the enumerated offenses clause was the basis for the petitioner's ACCA enhancement. In that case, the government asserted that *Winston* was not applicable because the record revealed that the court at sentencing “specifically counted Petitioner's burglaries under the enumerated clause, rather than the residual clause.” *Id.* The district court went on to explain that this was a “non-essential conclusion[] a court may or may not have articulated on the record in determining the defendant's sentence.” *Cade*, 276 F. Supp. 3d at 507–08 (citing *Winston*, 850 F.3d at 682). Even though Mr. Cade's petition relied on *Mathis v. United States*, 136 S. Ct. 2243 (2016), in addition to *Johnson*, there was no question that his petition “relie[d] on’ *Johnson*, as he would not be entitled to relief without it,” and the district court granted relief. *Id.* at 508.

In another example, *United States v. Foster*, a petitioner filed a *Johnson* motion alleging that his sentence was invalid even though the Fourth Circuit

had explicitly found on direct appeal that his prior burglary convictions qualified as generic burglaries. 2017 WL 2628887, at *3 (W.D. Va. June 19, 2017). Applying *Winston*, the district court (who was also the sentencing judge) explained that, under *Winston*, Mr. Foster was entitled to relief because “the residual clause *may have been* used by the prosecution to establish his status, although it was not.” *Id.* (emphasis added). Given the outcome of *Cade* and *Foster*, it is clear that Mr. Snyder would be entitled to relief if he had been sentenced anywhere in the Fourth Circuit. Indeed, dozens of other decisions demonstrate that the *Winston* case has been applied to petitioners in Mr. Snyder’s position with favorable results.¹

In contrast, the *Snyder* decision is being applied even in cases where there is some explicit indication that the sentencing court may have relied on the residual clause. For example, in *United States v. Couchman*, the sentencing court explained on the record in relation to Mr. Couchman’s prior convictions that “the decisions don’t require that there be actual violence in particu-

¹ See also e.g., *Graham v. United States*, 276 F. Supp. 3d 509, 515 (D.S.C. 2017) (vacating conviction predicated on burglaries); *Jones v. United States*, No. 4:02-CR-01017-TLW-1, 2017 WL 3620056, at *5 (D.S.C. Aug. 23, 2017) (same); *United States v. Hairston*, No. 4:04-CR-00008-1, 2018 WL 561861, at *3 (W.D. Va. Jan. 25, 2018) (same as to burglary and robbery convictions); *Pannell v. United States*, No. 7:02CR00002, 2018 WL 542978, at *3 (W.D. Va. Jan. 24, 2018) (same as to burglary, robbery, and malicious wounding convictions).

lar in connection with a particular offense, but rather if the burglary, for example, involves a building or structure that's deemed to involve a *sufficient risk of violence for the nature of it*.” *United States v. Couchman*, No. 17-6018, 2018 WL 343560, at *1 (10th Cir. Jan. 10, 2018) (emphasis added). Even though this language clearly mirrors the language of the residual clause, the Tenth Circuit denied relief in that case under the *Snyder* framework.

Winston and *Snyder* directly conflict for another reason. In *Winston*, binding circuit precedent at the time of Mr. Winston's original sentencing held that his predicate conviction for Virginia robbery was an ACCA prior conviction squarely under the force clause. *Winston*, 850 F.3d at 683 (citing *United States v. Presley*, 52 F.3d 64, 69 (4th Cir. 1995)). Thus, the “background legal environment” of Mr. Winston's sentencing meant that his prior conviction would have qualified as an ACCA predicate under the force clause. Nonetheless, in *Winston*, the Fourth Circuit explained that “[a]lthough Winston's claim depends on the interplay between *Johnson II*, permitting post-conviction review of the ACCA-enhanced sentence, and *Johnson I*, defining the scope of the force clause, Winston nonetheless relied to a sufficient degree on *Johnson II* to permit our present review of his claim.” *Winston*, 850 F.3d at 682 n.4. In the same way, Mr. Snyder's claim depends on the “interplay” between *Johnson* and *Mathis*. If he were in the Fourth Circuit, Mr. Snyder would be entitled to relief

because his claim still “relies on” *Johnson* to a significant degree: without *Johnson* his claim that he is serving an unconstitutional sentence would not be ripe for review. *Snyder* and *Winston* are therefore in direct conflict.

III. The Burden of Proof on Collateral Review.

The government argues that Mr. Snyder seeks to “upend the burden of proof on collateral review.” BIO at 14. But this is not the case. The way that the circuits characterize the legal error is fundamentally linked to differences in interpreting exactly *what* a petitioner must show by a preponderance of the evidence.

Under the plain language of section 2255, the burden is on the petitioner to make out a claim by showing that his sentence was “(1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack.” *See Hill v. United States*, 368 U.S. 424, 426-27 (1962) (construing statute)). The catch-all fourth category includes claims that reveal “fundamental defect[s]” which, if uncorrected, will “result[] in a complete miscarriage of justice,” or irregularities that are “inconsistent with the rudimentary demands of fair procedure.” *Hill*, 368 U.S. at 426-27. *See also, e.g. David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998). Mr. Snyder agrees that, on collateral review, the “[p]etitioner carries the burden in a collateral attack on a judgment,” by a preponderance of the evidence. *See, e.g., Hawk v. Olson*, 326

U.S. 271, 279 (1945). But Mr. Snyder can show a deprivation of rights—and a fundamental miscarriage of justice—by a preponderance of the evidence precisely because his sentence exceeds the statutory maximum if he were sentenced today.

The First and Eleventh Circuits (and the government at 17) propose a restrictive rule that Mr. Snyder and other defendants like him must show by a preponderance of the evidence *that he was sentenced under the residual clause* in order to obtain relief under *Johnson*. See *Beeman v. United States*, 871 F.3d 1215, 1221-22 (11th Cir. 2017); *Dimott v. United States*, 881 F.3d 232, 240 (1st Cir. 2018). Those in the Eleventh Circuit cannot meet their burden to demonstrate *Johnson* error if “it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement.” *Beeman*, 871 F.3d at 1222. Likewise, in the First Circuit, “[a] mere possibility” that the residual clause was relied on “is insufficient.” *Dimott*, 881 F.3d at 240. The problem for defendants in these circuits, as other courts have noted, is that it is often impossible to meet this burden because in so many cases a prior conviction could have arguably qualified under more than one of the ACCA’s violent felony definitions.

The rule in the Fourth and Ninth Circuits (and the one espoused by the *Beeman* dissent) is that a petitioner must show that—more likely than not—

the residual clause affected his sentencing in some way. Another way to conceptualize this type of claim is that the mere *availability* of the residual clause created the error. As explained above, the Fourth Circuit’s rule requires only that a petitioner *may have* been sentenced under the now-invalid residual clause. And the Ninth Circuit applied the similar principle set forth in *Stromberg v. California*, 283 U.S. 359 (1931), to the situation of an ambiguous sentencing record. *See United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017)

In *Stromberg*, this Court considered whether a criminal conviction could be upheld even though one of the three ways that a statute could be violated was ultimately found to be unconstitutional. This Court explained that the case had to be remanded because there was no way to determine from the available record whether the jury had relied on a constitutional or unconstitutional alternative ground. *Stromberg*, 283 U.S. at 367–68. In the same way, Mr. Snyder’s sentence *may have rested on an invalid ground*. The Ninth Circuit was persuaded that a rule “analogous to the *Stromberg* principle should apply in the sentencing context.” *Id.* In other words, the availability of the unconstitutional ground (the residual clause) at Mr. Geozos’ sentencing was the legal error, and Mr. Snyder can prove the *availability* of the residual clause by a preponderance of the evidence.

The government admits (at 15) that “courts sometimes relied on the residual clause to conclude that specific burglary offenses qualified as ACCA

predicates.” Given this concession, it is impossible to be sure what the sentencing court had in its mind—or if it was even thinking about this analysis—at the time of Mr. Snyder’s sentencing. And the availability of the residual clause affected Mr. Snyder’s sentencing (as well as hundreds of other defendants’ sentencings) by eliminating any incentive to object to the characterization of a prior burglary offense as “enumerated.”

Moreover, at least one panel of the Eleventh Circuit—in the context of deciding whether to grant authorization to a petitioner to file a second or successive motion—found that “it makes no difference whether the sentencing judge used the words ‘residual clause’ or ‘elements clause,’ or some similar phrase” only that the defendant “make the showing that his sentence is now unlawful.” *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016).² Thus, the government’s assertion that Mr. Snyder is seeking to “upend the burden of proof” is incorrect; Mr. Snyder and others in his position seek clarity about what exactly he must show in order to satisfy the burden of proof, especially in light of

² Following this Court’s decision in *Sessions v. Dimaya*, this silent record issue will arise in contexts other than the ACCA context, and may be relevant to the question of whether a sentencing court “relied on” the residual clause of section 924(c) at sentencing. *See Sessions v. Dimaya*, No. 15-1498, 2018 WL 1800371, at *34 (U.S. Apr. 17, 2018) (Roberts, J., dissenting) (noting that *Dimaya* “calls into question convictions under” section 924(c)).

the plain language of section 2255, which requires only a showing that his sentence is invalid.

Finally, the government’s conception of “arbitrariness” is misguided and does not square with the cautionary language in *Teague* about the “inequity resulting from the uneven application of new rules to similarly situated defendants.” *Teague v. Lane*, 489 U.S. 288, 316 (1989). The government does not dispute that the actual rule in *Johnson* has been applied arbitrarily to petitioners—indeed it could not. That is because hundreds of petitioners alleged that their ACCA sentences could not survive *Johnson* because they were enhanced on the basis of prior burglary or other convictions that no longer qualify as violent felonies. A great many of them were released as a result, even on silent records (indeed, some even where prior records clearly showed reliance on the enumerated offenses clause).³ In other, similar cases, the United States *conceded* that relief was warranted where a petitioner could show that his

³ A non-exhaustive list of cases in which ACCA sentences were vacated either in part or solely on the basis of prior burglary offenses after *Johnson* is as follows: *Mays v. United States*, 817 F.3d 728 (11th Cir. 2016); *United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016); *Ramey v. United States*, No. 2:03-CR-0220-CLS-JEO, 2015 WL 9268135, at *1 (N.D. Ala. Dec. 21, 2015). *United States v. Gray*, No. 2:06-CR-2017-LRS-1, 2016 WL 224111, at *4 (E.D. Wash. Jan. 19, 2016).

ACCA sentence was invalid—and the United States waived procedural defenses, in many cases—including the ambiguous record issue that is the subject of this petition.⁴ Still other petitioners—barred from relief by the rules created in the Tenth, Eleventh and First circuits—have sought relief through 28 U.S.C. § 2241 and have been released from their sentences under the savings clause of section 2255(e).⁵ In short, the federal courts are awash with cases in which those in Mr. Snyder’s position have been granted relief and immediate resentencing because their predicates are no longer ACCA-qualifiers under today’s law.

Instead, the government’s argument is that “it is not arbitrary to require a prisoner to satisfy the ordinary burden of proof when seeking collateral relief under *Johnson*.” BIO at 17. But, as explained above, Mr. Snyder is not seeking to prove his claim by assuming a lighter burden of proof; rather, the question is exactly *what error* Mr. Snyder must demonstrate when his sentence is now

⁴ See, e.g., *United States v. Leonard Lee Estes*, Case No. 05-CR-00187-WYD, “United States’ Answer to Defendant’s 28 U.S.C. § 2255 Motion,” ECF No. 41 at 6 (May 25, 2016) (conceding relief for individual with Colorado burglary predicates); *United States v. Joseph John Lewis*, Case No. 1:05-cr-00027-MSK-1, RESPONSE to Motion by USA as to Joseph John Lewis re 40 MOTION to Vacate under 28 U.S.C. 2255, Doc. No. 48 (same for Iowa burglary).

⁵ See, e.g., *Jahns v. Julian*, No. 2:16-CV-0239-JMS-DLP, 2018 WL 1566808, at *6 (S.D. Ind. Mar. 30, 2018); *Moreno v. Ives*, Case No. 17-cv-08497, Doc. No. 12; (January 22, 2018); *Smith v. Martinez*, 2018 WL 558996, (D. Ariz. Jan. 5, 2018).

unconstitutional. Citing *Bousley v. United States*, 523 U.S. 614, 621 (1998), the government explains that a collateral attack motion is an “extraordinary remedy” and goes through much hand-wringing about the presumption of finality on collateral review. But while “[f]ederal courts are not forums in which to relitigate state trials,” *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993), they should be forums in which a federally-imposed sentence—that is now clearly invalid—may be collaterally attacked under the plain language of section 2255. As demonstrated by the volume of cases in which petitioners have already been resentenced, an ACCA resentencing is a simple process that does not overburden the federal courts.

IV. Mr. Snyder’s *Johnson* Claim Is Timely and Is Not Barred by the Doctrine of Procedural Default

The *Snyder* panel found that Mr. Snyder’s claim was timely, explaining that “[i]n order to be timely under § 2255(f)(3), a § 2255 motion need only ‘invoke’ the newly recognized right, regardless of whether or not the facts of record ultimately support the movant’s claim.” *Snyder*, 871 F.3d at 1126. Similarly, the panel below squarely rejected the government’s argument on the issue of procedural default. *Snyder*, 871 F.3d at 1128 (“Because he has shown both cause and prejudice, his claim overcomes procedural default.”). This Court has held that the procedural-default doctrine does not bar claims raised for the first time on collateral review that, as here, rely on a new and retroactive rule

of constitutional law. *See Reed v. Ross*, 468 U.S. 1, 17–18 (1984).

Mr. Snyder’s claim is a *Johnson* claim because—prior to *Johnson*—any argument about the validity of Mr. Snyder’s sentence would have been foreclosed by the existence of the residual clause. Although Mr. Snyder cites *Mathis* to show that his prior burglary offenses no longer qualify as ACCA predicates, the interplay between *Johnson* and *Mathis* establish that Mr. Snyder is now serving an unconstitutional sentence. Moreover, *Mathis* plainly applies retroactively to cases on collateral review under *Teague*. *Mathis* did not create a new rule but, rather, applied a longstanding principle that had “bec[o]me a mantra” and been reiterated to the point of “downright tedium” in prior cases from this Court. *Mathis*, 136 S. Ct. at 2251–52.⁶

V. The Wyoming Statute is Overbroad and Indivisible.

The government incorrectly asserts that the Wyoming burglary statute is divisible. There is no reason to re-litigate this issue when it was not the basis of the Tenth Circuit’s decision below, and when the Tenth Circuit all but agreed that the Wyoming statute would no longer qualify as generic burglary today. As the *Snyder* panel explained, *Mathis* abrogated Tenth Circuit law holding

⁶ Decisions need not create a “new rule” to apply retroactively to collateral review; rather, something like the opposite is true. *See, e.g., also Stringer v. Black*, 503 U.S. 222, 227–37 (1992) (*Teague* did not apply where there was no “new rule”); As this Court put it in *Whorton v. Bockting*, 549 U.S. 406, 416 (2007), “an old rule applies both on direct and collateral review.”

that Wyoming burglary can sometimes qualify as a violent felony. *See Snyder*, 871 F.3d at 1129 n.4. Citing *United States v. Gonzales*, 558 F.3d 1193 (10th Cir. 2009), the Tenth Circuit explained that, prior to *Mathis*, the Wyoming statute was considered divisible, and “Wyoming state burglary convictions that involved occupied structures constituted qualifying offenses under the ACCA’s enumerated crimes clause.” *Snyder*, 871 F.3d at 1129 n.4. But the panel further explained that “*Gonzales* has since been abrogated by [this] Court’s decision in *Mathis*.” *Id.* This Court similarly noted that Tenth Circuit divisibility law was abrogated by *Mathis*. 136 S. Ct. at 2251 n.1.

A quick look at the statute demonstrates that the Wyoming burglary statute is overbroad and indivisible like the Iowa statute considered in *Mathis*, and cannot serve as an ACCA predicate, because it because Wyoming’s statute includes burglaries of vehicles, as well as buildings or other structures. *See Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013). Those “listed locations are not alternative elements, going toward the creation of separate crimes” but are, rather, alternative means. *Mathis*, 136 S. Ct. at 2250.⁷ In any

⁷ Mr. Snyder further notes that the government misreads *Collins v. State*, 854 P.2d 688 (1993). The government (at 23) argues that, in *Collins* the Wyoming court said that “burglary of a vehicle ‘stands alone’ as a distinct offense.” (citing *Collins*, 854 P.2d at 696). The *Collins* court rejected the defendant’s argument that the statute didn’t apply to him when he had burglarized an *unoccupied* vehicle, because it “completely eliminated the thrust of the definition of

event, as noted, the Court need not reach this issue because it wasn't the basis of the Tenth Circuit's decision.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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‘occupied structure’” as including “a structure or vehicle *whether or not a person is actually present.*” *Collins*, 854 P.2d at 696 (emphasis added).

And although the bracketed alternatives in the Wyoming jury instructions cited by the government would allow a trial court to elect a certain locational alternative when submitting a case to the jury, the instructions do not *require* election. The jury instructions refer to “Element[] 5”—which includes all of the locational alternatives—as a single element. *See, e.g. United States v. Naylor*, No. 16-2047, 2018 WL 1630249, at *7 (8th Cir. Apr. 5, 2018) (rejecting governments argument that bracketed alternatives be elements because they are set off in a series of adjacent sets of parentheses).