

No. 17-8457

IN THE SUPREME COURT OF THE UNITED STATES

EVERETT B. ROBINSON, 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 postconviction relief based on Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the definition of a "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), where the court of appeals found that the law at the time of petitioner's sentencing supported his sentence under a different clause of the definition of a "violent felony" and the record contained no indication that the sentencing court instead relied on the residual clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is not published in the Federal Reporter but is reprinted at 720 Fed. Appx. 946. The order of the district court (Pet. App. B1-B9) is not published in the Federal Supplement but is available at 2017 WL 437417.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2018. The petition for a writ of certiorari was filed on April 9, 2018. 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 Western District of Oklahoma, 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 180 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed, 304 Fed. Appx. 746, and this Court denied a petition for a writ of certiorari, 556 U.S. 1250. In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. D. Ct. Doc. 64 (May 6, 2010). The district court denied that motion, D. Ct. Doc. 67, at 1-2 (May 12, 2010), and the court of appeals denied a certificate of appealability (COA), 401 Fed. Appx. 334. Petitioner sought authorization to file two second-or-successive motions under Section 2255, which the court of appeals denied. See 15-6153 C.A. Order, at 1-3 (Sept. 24, 2015); 544 Fed. Appx. 798. In 2016, petitioner filed an authorized second-or-successive motion under Section 2255. D. Ct. Doc. 94 (May 20, 2016). The district court denied petitioner's motion and denied a COA. Pet. App. B1-B9. The court of appeals granted a COA and affirmed. Id. at A1-A16.

1. In 2006, police officers responded to a report of a domestic dispute at an apartment building involving a man waving a gun and threatening a woman. Presentence Investigation Report

(PSR) ¶ 4. As the officers approached the scene, they saw petitioner ducking behind the building and then walking away. PSR ¶¶ 4-5. The officers stopped petitioner and discovered a loaded .38-caliber revolver in his coat pocket. PSR ¶ 4. A jury subsequently found petitioner guilty of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1.

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).

In its presentence report, the Probation Office determined that petitioner was subject to an enhanced sentence under the ACCA. PSR ¶¶ 19, 80. The Probation Office found that petitioner had three prior convictions that qualified as violent felonies, including a 1973 Oklahoma conviction for robbery with a firearm, a 1989 Arkansas burglary conviction, and a 2005 Oklahoma conviction for assault and battery with a dangerous weapon. PSR ¶¶ 19, 23, 31, 35. Relying on court records, the Probation Office determined that petitioner's Arkansas burglary offense involved burglary of a house. PSR ¶ 31. The Probation Office did not, however, expressly determine whether that offense qualified as an ACCA predicate under the enumerated offenses clause (which includes "burglary") or the residual clause.

Petitioner objected to the Probation Office's reliance on his Oklahoma robbery and Arkansas burglary convictions on the ground that the offenses were too old to justify an enhanced sentence under the ACCA. D. Ct. Doc. 48, at 2-5 (Aug. 27, 2007); see PSR Addendum 23-24. He did not, however, object to the classification of those offenses as violent felonies.

The district court accepted the Probation Office's determination that petitioner was an armed career criminal and overruled his objection based on the age of his prior convictions. Sent. Tr. 3-4. The court sentenced petitioner to 180 months of imprisonment. Id. at 10; see Judgment 2. The court of appeals

affirmed. 304 Fed. Appx. 746. This Court denied a petition for a writ of certiorari. 556 U.S. 1250.

In 2010, petitioner filed a motion to vacate his sentence under Section 2255 in which he alleged several errors related to the conduct of his trial. See D. Ct. Doc. 64, at 4-11. The district court denied that motion, D. Ct. Doc. 67, at 1-2, and the court of appeals denied a COA, 401 Fed. Appx. 334.

2. 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 obtained authorization to file a second-or-successive motion for postconviction relief under Section 2255. Pet. App. B1. Petitioner argued (as relevant here) that his conviction for Arkansas burglary could not qualify as a violent felony under the ACCA's residual clause following Johnson. D. Ct. Doc. 94, at 11. He further argued that Arkansas burglary did not qualify as a violent felony under the enumerated offenses clause. Id. at 4. Although petitioner's pro se motion did not describe

the bases for the latter argument, it presumably rested on the contention that the version of Arkansas's burglary statute under which petitioner was convicted (which included burglary of certain vehicles used for habitation or commercial purposes, see Ark. Code Ann. §§ 5-39-101(1) and 5-39-201(a) (West 1987)) was broader than generic "burglary" under the enumerated offenses clause (which is defined to include burglary of a "building or other structure," Taylor v. United States, 495 U.S. 575, 598 (1990)).

3. The district court denied petitioner's motion as untimely. Pet. App. B4-B5.

A federal prisoner generally must file a motion for postconviction 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 2009, and thus the district court concluded that the deadline for filing a Section 2255 motion had "clearly passed." Pet. App. A5.

The district court further determined that petitioner's motion did not satisfy 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. B5. The court reasoned that petitioner could not rely on Johnson as the start of a new one-year limitations period for filing his

motion because “burglary is an enumerated offense under the ACCA” and Johnson did not “call * * * into question” the validity of the enumerated offenses clause. Pet. App. B4. The court further determined that petitioner’s challenge to the application of the enumerated offenses clause was untimely because that challenge relied on Mathis v. United States, 136 S. Ct. 2243 (2016), which “did not recognize a new rule” for purposes of Section 2255(f)(3). Pet. App. B5. The court also denied a COA. Id. at B9.

4. The court of appeals granted a COA to review petitioner’s contention that his Arkansas burglary conviction was not an ACCA “violent felony,” and affirmed. Pet. App. A1-A16.

a. A prisoner may not obtain second-or-successive relief under Section 2255 unless he establishes (as relevant here) that his claim relies on a new, retroactively applicable “rule of constitutional law.” 28 U.S.C. 2255(h)(2); see 28 U.S.C. 2244(b)(2)(A). The court determined that, in light of that restriction, petitioner was required to prove that his ACCA sentence was the result of constitutional error under Johnson. Pet. App. A4-A5. The court explained that, to satisfy that burden, petitioner was required to show in light of “the sentencing record” and “the relevant background legal environment at the time of sentencing” that he was sentenced under the ACCA’s residual clause rather than the enumerated offenses clause. Id. at A5 (quoting

United States v. Snyder, 871 F.3d 1122, 1129 (10th Cir. 2017), cert. denied, No. 17-7157 (Apr. 30, 2018)).

The court of appeals determined that petitioner had failed to satisfy his burden of proof. Pet. App. A6-A10. The court observed that petitioner's 2007 sentencing "occurred against the backdrop" of this Court's decisions in Taylor, supra, and Shepard v. United States, 544 U.S. 13 (2005), which had been interpreted to permit courts to consider judicial records of a prior conviction in determining whether an offense qualified as a "violent felony" under the ACCA's enumerated offenses clause. Pet. App. A6 (citing Snyder, 871 F.3d at 1129); see Shepard, 544 U.S. at 26; Taylor, 495 U.S. at 602. The court noted that the Probation Office had "examined underlying state-court documents, without any objection by [petitioner], and determined that his Arkansas burglary conviction involved entry into a house." Pet. App. A8.

The court of appeals therefore determined that the sentencing court would have had ample grounds for classifying petitioner's offense as generic burglary under the enumerated offenses clause even if the Arkansas statute under which he was convicted covered some non-generic forms of burglary. See Pet. App. A7-A9. The court found "no mention whatsoever of the residual clause in the presentence report or any of the other district court pleadings or transcripts." Id. at A9. The court also observed that, "given the relevant background legal environment" at the time of

petitioner's sentencing, the sentencing court would have had "no need for reliance on the residual clause." Id. at A9 (quoting Snyder, 871 F.3d at 1130) (brackets omitted). The court thus determined that petitioner's claim was "not a true Johnson claim, but is rather a poorly disguised claim" challenging the application of the enumerated offenses clause under Taylor and Shepard, which did not warrant postconviction relief. Id. at A10 (quoting Snyder, 871 F.3d at 1130).

b. The court of appeals denied a COA on petitioner's claim that his sentence violated his due process rights, which was premised on the theory that he had erroneously been classified as an armed career criminal and thereby received a sentence above the statutory maximum term of imprisonment that would otherwise have applied. See Pet. App. A11-A12. The court observed, as a threshold matter, that it was "not clear" whether petitioner had preserved that claim in the district court. Id. at A11. The court further determined that, in any event, petitioner's claim was not based on a new, retroactively applicable rule of constitutional law announced by this Court, and thus did not satisfy the requirements for second-or-successive relief under Section 2255. Ibid. (citing 28 U.S.C. 2255(h)(2)). The court therefore concluded that "no reasonable jurist could debate whether [petitioner] is entitled to proceed with an independent due process claim." Id. at A11-A12.

c. Judge Holmes filed a concurring opinion in which he expressed his view that United States v. Spring, 80 F.3d 1450 (10th Cir. 1996) -- a decision cited in the government's brief as support for its contention that Arkansas burglary would have been classified as a violent felony under the ACCA's enumerated offenses clause at the time of petitioner's sentencing -- had been abrogated by this Court's decision in Shepard. Pet. App. A13-A16. Nonetheless, Judge Holmes "join[ed] in full" the panel's opinion, which did not cite Spring. Id. at A16.

ARGUMENT

Petitioner contends (Pet. 7-20) 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 decision below is correct and does not conflict with decisions of any other court of appeals. This Court has recently denied review of similar claims in other cases. See Westover v. United States, No. 17-7607 (Apr. 30, 2018); Snyder v. United States, No. 17-7157 (Apr. 30, 2018). The same result is appropriate here.

1. A federal prisoner generally may not obtain postconviction 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); see 28 U.S.C. 2244(b)(2)(A),

2255(h)(2) (providing that second-or-successive relief is limited to claims based on a new, retroactively applicable "rule of constitutional law"). 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").

The limitations on postconviction 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. B3-B5), or as a matter that affects the underlying merits of the claim, as the court of appeals did (id. at A5-A10), 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 would entitle him to collateral relief. Because petitioner failed to make that showing -- indeed, the court of appeals' examination of the record and relevant legal background at the time of petitioner's sentencing indicated that his sentence was based on the enumerated offenses clause and not the residual clause, ibid. -- relief was properly denied.

2. Petitioner's contrary arguments upend the burden of proof on collateral review. He contends (Pet. 10) that because a sentencing court "may have" relied on the ACCA's residual clause to classify Arkansas burglary as a violent felony, he should be granted resentencing to avoid the possibility of Johnson error. Cf. Pet. App. A5 (noting petitioner's argument below "that he should get the benefit of the doubt as to whether he was sentenced under the residual clause"). But that contention ignores the stringent limitations on postconviction 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) 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 conviction was 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); United States v. Barney, 955 F.2d 635, 640 (10th Cir. 1992) (same for Wyoming burglary). And as the court of appeals’ opinion indicates, the sentencing court in this case

likely applied the enumerated offenses clause, not the residual clause, when it sentenced petitioner in 2007. Pet. App. A5-A10.

The fact that courts sometimes relied on the residual clause to conclude that specific burglary offenses qualified as ACCA predicates does not suggest 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. 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 the 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 court 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. A5. 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 likely 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. As explained, second-or-successive relief is not available unless (inter alia) a prisoner establishes 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)(2). 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.

Petitioner’s case, like Winston, involves a second-or-successive motion under Section 2255. In petitioner’s case, however, the court of appeals’ examination of the record and the legal landscape at the time of petitioner’s sentencing revealed that his sentence was appropriately classified as a violent felony under the ACCA’s enumerated offenses clause. See, e.g., Pet. App. A9 (finding “no mention whatsoever of the residual clause in the presentence report or any of the other district court pleadings or transcripts” and that the record and “relevant background legal environment” at the time of sentencing indicated “no need for reliance on the residual clause”) (brackets and citation omitted). Winston does not address such a situation, much less require that a motion for postconviction relief under Johnson be granted in those circumstances. Moreover, Winston’s reasoning is based on since-rejected dicta from an Eleventh Circuit case. 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, 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 Tenth Circuit itself had expressly adopted that reasoning in United States v. Snyder, 871 F.3d 1122, 1128-1129 (2017), cert. denied, No. 17-7157 (Apr. 30, 2018), on which the court below relied, see Pet. A5-A6 (citing Snyder, 871 F.3d at 1129). 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. 10-12), 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 postconviction 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 court of appeals' analysis in this case indicates a resolution of that question of historical fact adverse to petitioner. See Pet. App. A5-A10.

4. Petitioner contends (Pet. 19-20) that, even if his ACCA sentence depended on application of the enumerated offenses clause rather than the residual clause, he would still be entitled to postconviction relief because his Arkansas burglary conviction no longer qualifies as a violent felony under the enumerated offenses clause in light of Mathis v. United States, 136 S. Ct. 2243 (2016). Mathis holds that a statute is divisible, and thus subject to analysis under the modified categorical approach described in Shepard v. United States, 544 U.S. 13 (2005), if it defines multiple offenses with different elements as opposed to alternative means of committing a single offense. Mathis, 136 S. Ct. at 2256.

Petitioner's contention does not warrant review. First, his Mathis claim is not cognizable on a second-or-successive motion under Section 2255. As explained, second-or-successive relief would only be available in the context of this case for claims arising under a "new rule of constitutional law, made retroactive to cases on collateral review." 28 U.S.C. 2255(h)(2); see 28 U.S.C. 2244(b)(2)(A). Mathis concerns the proper application of the ACCA's statutory provisions, not a rule of constitutional law. See, e.g., Potter v. United States, 887 F.3d 785, 788 (6th Cir. 2018) (explaining that Mathis involved only a "rule of statutory law" and thus "does not open the door for a second collateral attack"). Mathis also 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 does not provide a basis for second-or-successive relief under Section 2255.

Second, and relatedly, petitioner's 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 this Court recognized a “new[],” retroactively applicable right to relief. 28 U.S.C. 2255(f)(3). As explained, Mathis did not announce a new rule and thus it did not start a new limitations period under Section 2255(f)(3).

Third, the version of the Arkansas burglary statute under which petitioner was convicted may be 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, Arkansas prohibited burglary of an “occupiable structure of another person,” Ark. Code Ann. § 5-39-201(a) (West 1987), which the statute defined, in separate statutory subsections, to include any “vehicle, building or other structure” (A) where a “person lives or carries on a business or other calling”; (B) where “people assemble for purposes of business, government, education, religion, entertainment, or public transportation”; or (C) that “is customarily used for overnight accommodation of a person,” id. § 5-39-101(1).¹

¹ Arkansas’s current burglary statute distinguishes burglary of a “commercial occupiable structure,” Ark. Code Ann. § 5-39-201(b)(1) (2013), from burglary of a “residential occupiable structure,” id. § 5-39-201(a)(1). This Court has granted certiorari in United States v. Sims, No. 17-766 (Apr. 23, 2018),

As the court of appeals observed, the records of petitioner's conviction indicate that he was convicted of the distinct offense of burglarizing "a house." Pet. App. A8; see PSR ¶ 31. That fact suggests that the type of structure may have been treated as an element of a divisible offense under the version of Arkansas's burglary statute at issue in this case. See Mathis, 136 S. Ct. at 2256-2257 & n.7 (explaining that "record[s] of a prior conviction" that "referenc[e] one alternative term to the exclusion of all others" could indicate "that the statute contains a list of elements"). Regardless, the need for petitioner to prevail on both the question presented and a separate question about the divisibility of a since-repealed version of Arkansas's burglary statute (which is fundamentally a question of state law) in order to obtain relief demonstrates that this case is far from an "ideal vehicle" for addressing the question presented. Pet. 19.²

to address whether the statute's definition of a "residential occupiable structure," which includes burglary of a "vehicle" in which "any person lives" or that is "customarily used for overnight accommodation of a person," Ark. Code Ann. § 5-39-101(4)(A) (2013), is broader than generic burglary. Sims does not directly concern the Arkansas offense of commercial burglary.

² The possibility that petitioner's Arkansas burglary conviction would qualify as a violent felony under current law similarly counsels against reviewing petitioner's claim (Pet. 21-23) 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." Moreover, the court denied a COA on that claim, observing that petitioner did not appear to have preserved it in the district court and, in any event, the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2018

claim was not based on a retroactively applicable decision of this Court announcing a new rule of constitutional law, as would be necessary to raise the issue in a second-or-successive motion under Section 2255. Pet. App. A11-A12. Review of petitioner's due process claim is therefore not warranted.