

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

AARON NEAL SAFFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

MEREDITH B. ESSER
Counsel of Record for Petitioner
Assistant Federal Public Defender
meredith_esser@fd.org
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Fax: (303) 294-1192

QUESTION PRESENTED

The question in this case has arisen with great frequency in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). When a *Johnson* movant would not be an armed career criminal if sentenced today, how can he show that his sentence is infected with error?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI.....	7
I. The Lower Courts Are In Conflict Over How A Movant Can Demonstrate Sentencing Error After <i>Johnson</i>	7
II. The Tenth Circuit’s Rule Is Incorrect.....	12
III. The Tenth Circuit’s Rule Risks An Independent Due Process Violation.....	14
CONCLUSION.....	17
APPENDIX A: Opinion of the Court of Appeals	
APPENDIX B: Order of the District Court	

TABLE OF AUTHORITIES

	PAGE
Cases	
<i>Blackwell v. United States</i> , No. 4:10CR00012, 2017 WL 3167380 (W.D. Va. July 25, 2017)	11
<i>Cade v. United States</i> , 276 F. Supp. 3d 502 (D.S.C. 2017)	9, 10
<i>Dais v. United States</i> , No. 4:03-CR-00386-TLW-1, 2017 WL 3620048 (D.S.C. Aug. 23, 2017)	11
<i>David v. United States</i> , 134 F.3d 470 (1st Cir. 1998)	16
<i>Graham v. United States</i> , 276 F. Supp. 3d 509 (D.S.C. 2017)	11
<i>Hawk v. Olson</i> , 326 U.S. 271 (1945)	15
<i>Hicks v. United States</i> , 137 S. Ct. 2000 (2017)	14
<i>Hill v. United States</i> , 368 U.S. 424 (1962)	16
<i>In re Chance</i> , 831 F.3d 1335 (11th Cir. 2016)	8, 12, 14
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	passim
<i>Jones v. United States</i> , No. 4:02-CR-01017-TLW-1, 2017 WL 3620056 (D.S.C. Aug. 23, 2017)	11
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	passim
<i>Pannell v. United States</i> , No. 7:02CR00002, 2018 WL 542978 (W.D. Va. Jan. 24, 2018)	11

<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	8
<i>United States v. Foster</i> , 2017 WL 2628887 (W.D. Va. June 19, 2017)	10
<i>United States v. Gonzales</i> , 558 F.3d 1193 (10th Cir. 2009)	16, 17
<i>United States v. Grier</i> , 475 F.3d 556 (3d Cir. 2007)	15
<i>United States v. Hairston</i> , No. 4:04-CR-00008-1, 2018 WL 561861 (W.D. Va. Jan. 25, 2018)	11
<i>United States v. Kennedy</i> , 225 F.3d 1187 (10th Cir. 2000)	15
<i>United States v. Ladwig</i> , 192 F. Supp. 3d 1153 (E.D. Wash. 2016)	14
<i>United States v. LaForce</i> , No. 1:08CR00027, 2017 WL 3331742 (W.D. Va. Aug. 4, 2017)	11
<i>United States v. Presley</i> , 52 F.3d 64 (4th Cir. 1995)	11
<i>United States v. Safford</i> , 707 F. App'x 571 (10th Cir. 2017)	1, 6
<i>United States v. Shipp</i> , 589 F.3d 1084 (10th Cir. 2009)	15
<i>United States v. Snyder</i> , 871 F.3d 1122 (10th Cir. 2017)	passim
<i>United States v. Taylor</i> , 873 F.3d 476 (5th Cir. 2017)	7
<i>United States v. Trent</i> , 767 F.3d 1046 (10th Cir. 2014)	17
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016)	i, 5

<i>Winston v. United States</i> , 850 F.3d at 682 (4th Cir. 2017)	passim
--	--------

Statutes

18 U.S.C. § 3559	3
18 U.S.C. § 3583	3
18 U.S.C. § 922(g)(1)	3
18 U.S.C. § 924	passim
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2255	5, 15, 16

PETITION FOR A WRIT OF CERTIORI

Petitioner, Aaron Safford, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is available in online databases at *United States v. Safford*, 707 F. App'x 571 (10th Cir. 2017). The order of the district court denying Mr. Safford's motion to vacate is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on December 27, 2017. No petition for rehearing was filed, but one extension was requested. This petition is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act provides, in pertinent part:

(e)(1) In the case of a person who ... has three previous convictions ... for a violent felony ..., such person shall be ... imprisoned not less than fifteen years (2) As used in this subsection—

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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).

STATEMENT OF THE CASE

This case requires the Court to determine whether Aaron Safford's sentence should be vacated in light of the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On February 4, 2010, Mr. Safford pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Mr. Safford had been duck hunting in Carbon County, Wyoming, using a shotgun that he borrowed from his father. A game warden spoke to Mr. Safford and he admitted that he was not permitted to use guns. Later, a federal agent took a statement from Mr. Safford in which he also admitted to using the firearm and being a former felon.

Ordinarily, the maximum sentence for a conviction of felon in possession of a firearm is 10 years' imprisonment, 18 U.S.C. § 924(a)(2), and three years of supervised release. 18 U.S.C. §§ 3559, 3583. However, under the ACCA if a defendant convicted of felon in possession of a firearm "has three previous convictions . . . for a violent felony or a serious drug offense, or both," then the defendant must be "imprisoned not less than fifteen years," 18 U.S.C. § 924(e), and may be placed on supervised release for up to five years. 18 U.S.C. §§ 3559, 3583. At the time of Mr. Safford's sentencing, there were three ways that a prior conviction could qualify as a violent felony: (1) the conviction was for an

offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” (the “elements clause” or the “force clause”) (2) the conviction was for “burglary, arson, or extortion, [or an offense that] involves the use of explosives,” (the “enumerated offenses clause”) or (3) the offense was for a conviction that “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B).

Prior to sentencing the Probation Office prepared a Presentence Investigation Report (“PSR”) which determined that Mr. Safford qualified for an increased sentence under the ACCA based on two convictions for delivery of a controlled substance and one conviction for burglary in Wyoming. At sentencing, the district judge stated that he thought the fifteen-year sentence was too high, but explained that he did not have a choice but to sentence Mr. Safford to the ACCA mandatory minimum. Sent. Tr. at 6. Defense counsel agreed. *Id.* at 5. Mr. Safford ultimately filed a post-conviction motion based on ineffective assistance of counsel which was granted. Counsel was appointed but subsequently filed a pleading agreeing that Mr. Safford qualified for an ACCA sentence. R. vol. I at 80.

Nearly a decade after Mr. Safford’s sentencing, the United States Supreme Court decided *Johnson*, which ruled a portion of the ACCA unconstitutional. Specifically, *Johnson* held that one clause of the ACCA’s definition of the term “violent felony”—the so-called residual clause—is unconstitutionally vague. 135 S. Ct. at 2557. Under the ACCA, there were previously three ways that a prior conviction could qualify as a violent felony (and thus serve as a predicate for an increased sentence): (1) the conviction was for an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” under the “elements clause;” (2) the conviction was for “burglary, arson, or extortion, [or an offense that] involves the use of explosives,” under the “enumerated offenses clause;” or (3) the offense was for a conviction that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). In *Johnson*, this Court held that this third clause—the residual clause—could not be applied consistently with due process. Subsequently, this Court held that *Johnson* must be applied retroactively to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

After *Johnson*, the Tenth Circuit authorized Mr. Safford to file a second or successive motion to vacate pursuant to 28 U.S.C. § 2255. Mr. Safford filed a *pro se* motion that the district court construed as a Motion to Vacate based

on *Johnson*. R. vol. I at 4. In that filing, Mr. Safford argued that his Wyoming burglary predicate was not a violent felony after *Johnson* and that, after *Johnson*, he could not qualify for the ACCA enhancement. R. vol. I at 21, 23 (petitioner was sentenced “in excess of the maximum authorized by law.”). The district court denied Mr. Safford’s motion to vacate and found that *Johnson* was inapplicable because Mr. Safford was sentenced under the enumerated offenses clause and not the residual clause. R. vol. I at 84.

Mr. Safford filed a notice of appeal and was appointed counsel to represent him before the Tenth Circuit. There, Mr. Safford argued that his sentence violated due process after *Johnson* and *Mathis v. United States*, 136 S. Ct. 2243 (2016) because his prior burglary offense would not an ACCA-qualifiers under any ACCA clause if he were sentenced today. The Tenth Circuit rejected this argument. In order to establish *Johnson* error the Tenth Circuit consults “the sentencing record” and the “relevant background legal environment at the time of sentencing” to determine whether an ACCA sentence was based on the residual clause. *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017)

Under this rule, the *Safford* panel concluded that that the residual clause was not in play at Mr. Safford’s sentencing and the “mere ‘option’ of applying the ACCA’s residual clause [does not] constitute[] a *Johnson* error.” *United States v. Safford*, 707 F. App’x 571, 573 (10th Cir. 2017) (citation omitted).

REASONS FOR GRANTING CERTIORARI

The Court should grant review in this case because the circuits are divided over how a movant can show sentencing error if he would not be an armed career criminal under today's law. This case presents a recurring issue of national importance that will likely affect hundreds of criminal defendants nationwide. This Court's prompt review is also warranted because of the important liberty interests at stake.

I. The Lower Courts Are In Conflict Over How A Movant Can Demonstrate Sentencing Error After *Johnson*.

The federal courts of appeal (and the district courts before them) have taken a variety of different approaches to resolving the question of how a movant can show sentencing error where he would not be an armed career criminal if sentenced today. *See United States v. Taylor*, 873 F.3d 476, 480 (5th Cir. 2017) (collecting cases). This Court should grant review in order to resolve the lower courts' acknowledged circuit split.

Snyder, which was applied in the decision below, is in direct conflict with the law in the Fourth Circuit. As noted, the Tenth Circuit has held that if, based on the record and the "relevant background legal environment," a movant's sentence could have rested on a clause other than the residual clause at sentencing, a movant has not demonstrated sentencing error under *Johnson*. *Snyder*, 871 F.3d at 1130.

The Fourth Circuit’s test flips the inquiry. The Fourth Circuit has held that a *Johnson* movant need only show that his sentence “*may have been predicated on application of the now-void residual clause, and therefore may be an unlawful sentence*” in order to demonstrate *Johnson* error. *Winston v. United States*, 850 F.3d at 682 (4th Cir. 2017). Acknowledging the common problem of ambiguous ACCA sentencing records, the *Winston* court noted that that “[n]othing in the law requires a [court] to specify which clause it relied upon in imposing a[n ACCA] sentence.” *Id.* (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016)). The Fourth Circuit thus declined to “penalize a movant for a court’s discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony.” *Id.*

The Fourth Circuit further cautioned that requiring a movant to show affirmative reliance on the residual clause in order to demonstrate *Johnson* error would result in “‘selective application’ of the new rule of constitutional law announced in *Johnson*,” in violation of “‘the principle of treating similarly situated defendants the same.’” *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 304 (1989)). Under the *Winston* rule, the possibility that the sentencing court relied on the residual clause is enough to establish *Johnson* error. In *Winston*, the court found that the *Johnson* error was not harmless because the movant’s

prior conviction for Virginia robbery was no longer a crime of violence under the remaining clauses of the ACCA. *Winston*, 850 F.3d at 682 n.4.

The Tenth Circuit’s approach to this issue is directly at odds with the *Winston* decision. Under the *Winston* rule, Mr. Safford would prevail because the sentencing court *may have* relied on the residual clause at sentencing. And the *Johnson* error was not harmless in this case because Mr. Safford’s prior convictions do not qualify as violent felonies under the remaining ACCA clauses.

One need only glance at a few district court decisions from within the Fourth Circuit to see that Mr. Safford would have been granted relief under *Winston*. 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:

The fact that the [sentencing court] later accepted the Government’s position that his burglaries counted as generic burglaries under the enumerated clause does not mean that the Court did so to the exclusion of the residual clause; it was simply not necessary

to consider them under the residual clause, having already concluded that they counted under the enumerated clause. This is an example of 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* 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.” *Id.* at 508. Mr. Safford’s arguments are completely aligned with the arguments made by the petitioner in *Cade* and in *Cade* the petitioner was granted relief.

In another example, *United States v. Foster*, a petitioner filed *Johnson* motion alleging that his sentence was invalid even though the Fourth Circuit had explicitly found that his prior burglary convictions qualified as generic burglaries in his direct appeal. 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* (as well as many other similar cases) it is clear that Mr. Safford 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. Safford’s position with favorable results.¹

Moreover, 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*

¹ See, e.g., *Graham v. United States*, 276 F. Supp. 3d 509, 515 (D.S.C. 2017) (vacating conviction predicated on burglaries); *Dais v. United States*, No. 4:03-CR-00386-TLW-1, 2017 WL 3620048, at *5 (D.S.C. Aug. 23, 2017) (same); *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); *United States v. LaForce*, No. 1:08CR00027, 2017 WL 3331742, at *2 (W.D. Va. Aug. 4, 2017) (same as to burglary and robbery convictions); *Blackwell v. United States*, No. 4:10CR00012, 2017 WL 3167380, at *3 (W.D. Va. July 25, 2017) (same).

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. Safford’s claim depends on the “interplay” between *Johnson* and *Mathis*. If he were in the Fourth Circuit, Mr. Safford 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, and cannot be squared with one another.

II. The Tenth Circuit’s Rule Is Incorrect.

The Tenth Circuit’s rule requires a movant to show *Johnson* error by demonstrating that, under the “relevant background legal environment” at the time of sentencing, neither of the remaining violent felony clauses—the enumerated offenses clause or the force clause—would have captured the movant’s prior convictions. *Id.* at 1130. This approach is misguided because it will lead to arbitrary results. Early in the course of the *Johnson* litigation, the Eleventh Circuit highlighted this issue when it questioned why a court would decline to grant relief when a person’s sentence was no longer statutorily authorized—even if the “sentencing judge [had not] uttered the magic words ‘residual clause.’” *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016). The panel opined

that it would be inequitable to mandate the words “residual clause” actually appear in the record because such a step was never required at sentencing. *Id.*

Concerns over arbitrary application of *Johnson* also animated the Fourth Circuit’s rule that a *Johnson* movant need only show that his sentence “*may have been predicated on application of the now-void residual clause*” in order to show *Johnson* error. *Winston*, 850 F.3d at 682 (emphasis added). Prior to *Johnson*, courts were not required to make specific findings, and counsel had no incentive to object, where serious crimes clearly fell within the residual clause. Accordingly, the Fourth Circuit declined to “penalize a movant for a court’s discretionary choice not to specify” which clause it relied on. *Id.* And it declined to base its decision on “non-essential conclusions a court may or may not have articulated on the record in determining the defendant’s sentence.” *Id.*

In this way, the Tenth Circuit’s rule creates yet another arbitrariness concern. Because the legal landscape was in constant flux in the decades prior to *Johnson*, and recreating the landscape at a particular point in time will undoubtedly prove both cumbersome and impractical. As one district judge aptly explained, “[a]ttempting to recreate the legal landscape at the time of a defendant’s conviction is difficult enough on its own. But in the context of *Johnson* claims, the inquiry is made more difficult by the complicated nature of the legal

issues involved.” *United States v. Ladwig*, 192 F. Supp. 3d 1153, 1160 (E.D. Wash. 2016). It will also mean that movants who are sentenced in 2005 may be judged by a different standard for *Johnson* error than movants who were sentenced in 2010—even though their prior offenses may be the same.

The arbitrariness identified by the *Winston* panel is compounded when “decisions from the Supreme Court that were rendered since [sentencing]” can be ignored “in favor of a foray into a stale record.” *Chance*, 831 F.3d at 1340. For example, this Court in *Mathis* emphasized that “[f]or more than 25 years, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements.” *Id.* at 2257. Where the *Winston* court held that it was required to consider the interplay between *Johnson* and subsequent cases of this Court clarifying the scope of the violent felony definition, the *Snyder* panel applied stale and now-abrogated interpretations of this Court’s precedent to the question of whether a *Johnson* error occurred.

III. The Tenth Circuit’s Rule Risks An Independent Due Process Violation.

Finally, the Tenth Circuit’s rule creates a separate and independent due process violation: Movants whose prior convictions are not, in fact, ACCA qualifiers are serving unconstitutional sentences, and will remain in jail, doing more time than the law allows. Such a result is untenable. *Cf. Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (mem.) (Gorsuch, J., concurring) (“A plain

legal error infects this judgment—a man was wrongly sentenced to 20 years in prison under a defunct statute...[W]ho wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?").

Under section 2255(a), a petitioner may challenge a sentence “imposed in violation of the Constitution or laws of the United States” and “is in excess of the maximum authorized by law.” Requiring a defendant to serve above the statutory maximum allowable sentence thus violates due process, as several circuits have noted. *See, e.g., United States v. Grier*, 475 F.3d 556, 572 (3d Cir. 2007) (Rendell, J., concurring) (“Due process requires . . . that the sentence for the crime of conviction not exceed the statutory maximum.”); *United States v. Shipp*, 589 F.3d 1084, 1091 (10th Cir. 2009) (“[w]here, as here, [a petitioner] was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated”).

Although 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), Mr. Safford can meet this burden by showing that there has been “a deprivation of a constitutional right.” *See, e.g., United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000). *See also,*

e.g. David v. United States, 134 F.3d 470, 474 (1st Cir. 1998) (“burden is on the petitioner to make out a case for section 2255 relief,” and he can meet this burden 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.”) (quoting *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.

Mr. Safford can show such a deprivation of rights—and a fundamental a miscarriage of justice—by a preponderance of the evidence precisely because his sentence now exceeds the statutory maximum if he were sentenced today. The Tenth Circuit has 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 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 (citing with disfavor *United States v. Trent*, 767 F.3d 1046 (10th Cir. 2014)). Accordingly it is clear that Mr. Safford would not be ACCA-eligible under today's law and is serving an illegal sentence. For these reasons, the decision below is incorrect and should be reversed.

CONCLUSION

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

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Meredith B. Esser
MEREDITH B. ESSER
Assistant Federal Public Defender
Counsel of Record for the Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

May 25, 2018