No. ___________

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IN THE
SUPREME COURT OF THE UNITED STATES

JAY G. MATHIS,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

On Petition for Allowance of Appeal To The United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a COA should issue for a claim that the District Court erred in failing to vacate a sentence under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1), pursuant to *Johnson v. United States*, where the record indicates the sentencing court applied the now unconstitutional residual clause of ACCA.

2. Whether a COA should have issued for Mr. Mathis' claim that the District Court erred in failing to equitably toll the statute of limitations for his good cause shown.

3. Whether a COA should have issued for Mr. Mathis' claim that the District Court failed to grant an evidentiary hearing to address the ineffective assistance of counsel component of Mr. Mathis's Motion to Vacate.

PARTIES TO THE PROCEEDING

The Petitioner is Jay G. Mathis, an individual. The Respondent is the United States of America. There is no party with an interest to disclose pursuant to Rule 29(6).

PETITION FOR A WRIT OF CERTIORARI

Jay G. Mathis respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Third Circuit, entered on January 22, 2018, and February 22, 2018, each with a Not Precedential Opinion (App. A0013 and A 0014, respectively), are unreported. The opinion and order of the District Court in this matter is also unreported. (App. A 0001-0012).

This case was the subject of a prior (direct) appeal on issues distinct from this matter, wherein the United States Court of Appeals for the Third Circuit entered a judgment and opinion affirming the conviction and judgment of sentence on June 4, 2014. (*United States v. Jay G. Mathis*, No. 13-1819). That Not Precedential Opinion is unreported. This case was also the subject of a prior Petition for Writ of Certiorari to this Court with respect to the Judgment of the Third Circuit Court of Appeals in Mr. Mathis' direct appeal of his conviction and sentence. (*Jay G. Mathis v. United States*, No. 14-6148). That petition was denied on October 14, 2014.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. §1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The time for filing a Petition for Writ of Certiorari began to run on February 22, 2018, when the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for

Rehearing and Rehearing *En Banc*. The time for filing a Petition for Writ of Certiorari expires after May 23, 2018.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. VI

The Sixth Amendment to the United States Constitution provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

18 U.S.C. §3553

Section 3553(a) of Title 18 of the United States Code states:

3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission . . .

STATEMENT OF FACTS

A. <u>Nature of the Case</u>

This is an appeal of the denial of a certificate of appealability with respect to the District Court's denial of Mr. Mathis' Motion to Vacate under 28 U.S.C. §2255, entered in this matter on August 31, 2017 by the U.S. District Court for the Western District of Pennsylvania, Criminal No. 2:09-cr-00339; Civil No. 15-cv-1525. (A 0001-0012). Mr. Mathis alleges error in the Court of Appeals' order and opinion affirming the District Court's refusal to grant a Certificate of Appealability, reflected in the Court of Appeals' denial of Mr. Mathis' Application for

Certificate of Appealability, as well as its denial of Mr. Mathis' Application for Rehearing and Rehearing *En Banc*.

B. **Proceedings Below**

Following severed trials in the underlying matter Mr. Mathis was convicted on all counts (I-VII) of the Superseding Indictment (App. A 0016-0020) as follows:

- 18 U.S.C. §2113(a) – attempted bank robbery;
- 18 U.S.C. §2113(d) – attempted bank robbery;
- 18 U.S.C. §§922(g)(1) & 18 U.S.C. §924(e) – possession of a firearm and ammunition by a convicted felon (2 counts);
- 18 U.S.C. §924(c)(1)(A)(iii) – using and carrying a firearm during and in relation to a crime of violence and possessing a firearm in furtherance of a crime of violence (2 counts);
- 18 U.S.C. §1951 – Hobbs Act Robbery.

On March 11, 2013, the District Court sentenced Mr. Mathis to 600 months imprisonment and supervised release. (App. A 0023-0029) and (App. A 0030-0046). Mr. Mathis appealed the conviction and judgment of sentence to this Court on March 21, 2013 (*United States vs. Jay G. Mathis,* No. 13-1819). On June 4, 2014, The Third Circuit Court of Appeals affirmed the judgment. Mr. Mathis filed a Petition for Writ of Certiorari with this Court, which was denied on October 14, 2014. (*Jay Gregory Mathis v. United States*, No. 14-6148).

On October 28, 2015, Mr. Mathis, then serving his sentence at USP Big Sandy, filed by mail a *pro se* Motion for Continuance and Legal Counsel regarding his Motion to Vacate under 28 U.S.C. §2255. (App. A 0047-0050). The *pro se* Motion for Continuance and Legal Counsel asserted that Mr. Mathis was unsure how to seek additional relief regarding his sentence.

Although the Motion for Continuance and Legal Counsel was dated October 28, 2015, one year and 14 days following this Court's denial of Mr. Mathis' Petition for Writ of Certiorari, it asserted and documented extenuating circumstances that impeded Mr. Mathis' ability to prepare his request for legal relief. Specifically, Mr. Mathis asserted that USP Big Sandy was on modified movement status for a period of time in the months preceding the one year anniversary of the Supreme Court's denial of his Petition for Writ of Certiorari. The modified movement status prevented him from accessing legal resources necessary to prepare a *pro se* request for relief. The Motion for Continuance and Legal Counsel attached an official memorandum from USP Big Sandy verifying the periods of modified movement during this critical period of time:

- July 27– September 8, 2015
- October 6 – October 19, 2015
- October 22 – October 27, 2015

On November 5, 2015, the District Court docketed Mr. Mathis' *pro se* motion as a "Motion to Continue/ and a Motion to Appoint Counsel." (ECF Doc. 199). The District Court Judge who received Mr. Mathis' Motion to Vacate, and who would issue all rulings thereafter, was not the same judge who tried and sentenced Mr. Mathis in the District Court. On November 6, 2015, the District Court denied Mr. Mathis' Motion to Continue and Motion to Appoint Counsel because the statute of limitations had expired. (ECF Doc. 200). The District Court stated that Mr. Mathis could file a §2255 motion at which time the Court would consider the timeliness issue. (ECF Doc. 200).

On November 14, 2015, Mr. Mathis mailed his *pro se* Motion for Relief under 28 U.S.C. §2255. Mr. Mathis included a 24 page memorandum outlining the factual and legal bases for his claims. (App. A 0051-0089). The District Court docketed Mr. Mathis' *pro se* Motion for Relief under 28 U.S.C. §2255 as having been received on November 20, 2015. (ECF Doc. 201). The memorandum incorporated into Mr. Mathis' *pro se* Motion for Relief raised the following issues relating to claims of ineffective assistance of counsel:

a. Failing to move for the trial judge's recusal based on his conflict of interest in having represented Mr. Mathis in a prior unrelated criminal matter;

b. Failing to request jury instructions and failing to object to inadequate jury instructions;

c. A prejudicial breakdown of the attorney-client relationship that affected communication about material trial decisions and guilty plea discussions;

d. Failure of appellate counsel for failure to brief and argue significant relevant issues.

On December 29, 2015, the United States filed a motion to dismiss Mr. Mathis' Motion to Vacate, asserting that it was filed after the statute of limitations. (ECF Doc. 204). On February 1, 2016, Mr. Mathis filed a 5 page Supplement to his *pro se* Motion to Vacate arguing that this Court's precedential U.S. Supreme Court decision in *Johnson v. United States,* 135 S. Ct. 2251 (2015), entitled him to relief under the Armed Career Criminal Act, 18 U.S.C. §924(e). (App. A 0090-0102). The Court docketed Mr. Mathis' Supplement to his *pro se* Motion to Vacate on February 5, 2016. (ECF Doc. 209).

On March 7, 2016, Mr. Mathis, through undersigned counsel, filed a Supplement to *pro se* Motion to Vacate under 28 U.S.C. §2255. (App. A 0103-0122). (ECF Doc. 210). The Supplement further developed Mr. Mathis' entitlement to sentencing relief under *Johnson* and his ineffective assistance of trial and appellate counsel claims. On April 1, 2016, the District Court stayed the underlying proceedings on Mr. Mathis' Motion, pending the outcome of this Court's decision in *Welch v. United States,* No. 15-6418. (ECF Doc. 212). On July 14, 2016, Mr. Mathis filed a Supplemental Brief in Support of his *pro se* §2255 motion asserting that the *Welch* decision demonstrated unequivocally that the *Johnson* holding applied retroactively to Mr. Mathis' sentence under the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA"). (ECF Doc. 219).

On July 26, 2016, the District Court stayed Mr. Mathis' Motion to Vacate, pending this Court's decision in *Beckles v. United States,* No. 15-8544. (ECF Doc. 222). On March 23, 2017, Mr. Mathis, with leave of Court, filed a Second Supplemental Brief in support of his Motion to Vacate, asserting that the *Beckles* decision had no impact on *Johnson*-based arguments which related specifically to sentencing under the ACCA or other mandatory statutory portions. (ECF Doc. 224).

On May 10, 2017, the government filed a Supplemental Response to Motion under 28 U.S.C. §2255. (ECF Doc. 230). On July 6, 2017, Mr. Mathis filed a Reply to the Government's Supplemental Response reaffirming his claims, and requesting an evidentiary hearing. (ECF Doc. 230).

On August 31, 2017, the District Court issued an Order and Opinion denying Mr. Mathis' motion, with findings and conclusions that include the following:

a. A rejection of Mr. Mathis' request for equitable tolling of the statute of limitations, finding, without the benefit of an evidentiary hearing, it "unclear how modified movement impacted Defendant's ability to prepare and file a Motion within the applicable time period;

b. A rejection of Mr. Mathis' ineffective assistance claims, but admitting that it did "not review each contention in detail;"

c. A denial of Mr. Mathis' *Johnson* claims, based on a single conviction under 18 U.S.C. §2113(a) on a three count indictment in 1998.

d. A denial of Mr. Mathis' request for a hearing without making any specific findings.

e. An order that a COA should not issue, citing the legal standard for issuing a COA, but offering no further explanation.

(App. A 0001-0012).

On October 30, 2017, Mr. Mathis filed a Notice of Appeal, and on November 2, 2017, filed an Application for Certificate of Appealability with the Third Circuit Court of Appeals. On

January 22, 2018, the Court of Appeals issued an order and opinion denying the Application for Certificate of Appealability, as follows:

ORDER

The foregoing application for a certificate of appealability is denied. Jurists of reason would not dispute the District Court's determination that Appellant's claims are time-barred and/or meritless, substantially for the reasons given by the District Court. See Slack v. McDaniel, 529 U.S. 473, 483–84 (2000).

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: January 22, 2018
JK/cc: Laura S. Irwin, Esq.
James W. Kraus, Esq.
Jay Gregory Mathis

(App. A 0013).

On February 5, 2018, Mr. Mathis filed a Petition for Rehearing and Rehearing *En Banc* with the Court of Appeals, asserting that that the decision of the panel of that Court was inconsistent with precedential decisions of this Court, and that consideration by the full Court was necessary to secure and maintain uniformity of decisions in the Court of Appeals, *i.e., the* panel decision was contrary: to *Johnson v. United States,* 135 S. Ct. 2251 (2015), which determined that the residual clause of the Armed Career Criminal Act, 18 U.S.C. §924(e) ("ACCA") is unconstitutional. Mr. Mathis asserted that both the District Court and the Panel denied Mr. Mathis a Certificate of appealability despite the record demonstrating that Mr. Mathis was sentenced under ACCA without identification of 3 predicate offenses that would have qualified, in light of the now unconstitutional residual clause of the Act. Mr. Mathis asserted further that both clearly erroneous rulings resulted in the denial of Mr. Mathis' rights under the 5th and 6th Amendments of the U.S. Constitution.

On February 22, 2018, the Court of Appeals issued an order denying Mr. Mathis' Petition for Rehearing and Rehearing *En Banc,* as follows:

> Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, and RESTREPO, Circuit Judges
>
> The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.
>
> BY THE COURT
>
> s/ Kent A. Jordan
> Circuit Judge

DATE: February 22, 2018

REASONS FOR GRANTING THE PETITION

1. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN DENYING THE APPLICATION FOR CERTIFICATE OF AVAILABILITY WITH RESPECT TO THE DISTRICT COURT'S DENIAL OF MR. MATHIS' MOTION TO VACATE SENTENCE UNDER *JOHNSON V. UNITED STATES,* DESPITE THE RECORD DEMONSTRATING THAT MR. MATHIS WAS SENTENCED UNDER THE NOW UNCONSTITUTIONAL RESIDUAL CLAUSE OF ACCA.

2. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN DENYING THE APPLICATION FOR CERTIFICATE OF AVAILABILITY WITH RESPECT TO THE DISTRICT COURT'S FAILURE TO EQUITABLY TOLL THE STATUTE OF LIMITATIONS FOR GOOD CAUSE SHOWN, DESPITE EVIDENCE OF RECORD THAT THE DISTRICT COURT ERRED IN ADDRESSING THOSE CLAIMS.

3. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN DENYING THE APPLICATION FOR CERTIFICATE OF AVAILABILITY WITH RESPECT TO THE DISTRICT COURT'S FAILURE TO GRANT AN EVIDENTIARY HEARING TO ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL COMPONENT OF MR. MATHIS' MOTION TO VACATE, DESPITE A CLEAR INDICATION IN THE RECORD THAT UNRESOLVED FACTUAL ISSUES REQUIRED AN EVIDENTIARY HEARING.

I. THE STANDARDS APPLICABLE TO ISSUANCE OF A COA.

An applicant who wishes to appeal a district court's denial of a motion for relief under 28 U.S.C. § 2255 must obtain a COA pursuant to 28 U.S.C. § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 476 (2000). If a district court denies issuance of a COA, a petitioner may make an application for one to the U.S. Court of Appeals under 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure ("FRAP").

The U.S. Court of Appeals may issue a COA if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits...[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Importantly, however, "a COA does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). "Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.*

II. THE COURT OF APPEALS' DENIAL OF A CERTIFICATE OF APPEALABILITY REGARDING DISTRICT COURT'S DENIAL OF MR. MATHIS' MOTION TO VACATE SENTENCE UNDER *JOHNSON v. UNITED STATES* DESPITE EVIDENCE THAT HE WAS SENTENCED UNDER THE NOW UNCONSTITUTIONAL RESIDUAL CLAUSE, WAS ERROR.

The Armed Career Criminal Act (the "ACCA") under which Mr. Mathis was sentenced carries a mandatory minimum sentence of 15 years imprisonment for any violation of 18 U.S.C.

§ 922(g) when the defendant has three or more earlier convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1). The ACCA defined a "violent felony" as follows:

> Any crime punishable by imprisonment for a term exceeding one year…that
>
> > has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.* (emphasis added)

18 U.S.C. § 924(e)(2)(B). Subsection (i) is known as the use of force clause or the elements clause; the first part of subsection (ii) is the enumerated-offense clause; and the second part of subsection (ii) (in italics above) is the residual clause. 18 U.S.C. § 924(e)(1)(B); *United States v. Wolf*, No. 1:04-Cr-347-1, 2016 WL 6433151, at * 2 (M.D. Pa. Oct. 31, 2016).

In 2015, more than two years after Mr. Mathis' was sentenced, this Court ruled in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the residual clause was unconstitutionally vague and that increased sentences under it violate due process. The following year, this Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* applies retroactively on collateral review.

Because under *Johnson* a sentence under ACCA cannot rely on the residual clause's definition of violent felony, the government had the burden to show that three of Mr. Mathis' prior convictions met the use of force clause's violent felony definition. *United States v. Fisher*, No. 01-769-01, 2017 WL 1426049, at *2 (E.D. Pa. Apr. 21, 2017). For Mr. Mathis' sentence under ACCA to have been constitutional, the District Court must have credibly determined that the elements of the statutes under which Mr. Mathis was previously convicted matched the elements identified in the use of force clause's definition of a violent felony. *Harris*, 205 F.Supp.3d at 660. "If the elements of the crime of conviction 'cover a greater swath of conduct than the elements of the relevant ACCA offense,' [meaning that] if the elements are broader than the ACCA offense, then the conviction does not qualify as a predicate offense under the ACCA." *Id.* (quoting *Mathis v. United States* 136 S. Ct. 2243, 2251 (2016); *Fisher*, 2017 WL 1426049, at *2. Moreover, "[e]ven if the defendant's conduct fits within the ACCA offense, the mismatch of elements disqualifies the conviction as a predicate offense." *Id.* This is true because where the crime of conviction covers a larger scope of conduct, it is possible that the defendant may have been convicted under a provision of the statute that does not include the elements in the ACCA's use of force clause. *Id.*

The District Court's denial of Mr. Mathis' Motion to Vacate under *Johnson* failed to undertake this important analysis, or in the alternative, erred substantially. The Court of Appeals' denial of the opportunity to appeal the District Court's error was, for the same reasons, incorrect.

Mr. Mathis' sentencing Judge summarily concluded that Mr. Mathis was an armed career criminal offender (See Sent. Tr. ECF Doc. 179, p. 3) (App. A 0032), but did not identify the statutory definitions or the prior convictions it relied upon. In the absence of such explanation, it is reasonable to conclude that the sentencing court used the now unconstitutional residual clause to sentence Mr. Mathis to an ACCA mandatory minimum.

As indicated above, in its August 31, 2017 Opinion, the District Court posited that the three predicate offenses "at issue" involved bank robbery in violation of 18 U.S.C. §2113, specifically referring to a single conviction on a three count indictment for bank robbery in 1998 (WD Pa. Docket number 98-021, and hereinafter "1998 federal conviction"). (ECF Doc. 234, p. 9). The District Court's conclusion regarding the "three predicate offenses at issue" is not consistent with any portion of the record in the underlying case. Specifically, Counts Three and

Six of the Superseding Indictment,[1] which contained the charges against Mr. Mathis under 18 U.S.C. §922(g) and 924(e), asserted that the 1998 federal conviction was just one predicate offense, and listed two state court convictions for the crime of robbery in 1996 (Allegheny County, No. CC. 199513452) and 1986 (Allegheny County, No. OTN:B508936-1) as the other two predicate offenses. (App. A 0018-0021).

The District Court's Opinion denying Mr. Mathis' Motion to Vacate omitted references to the specific offenses alleged in the Superseding Indictment, finding instead that the single 1998 federal conviction was the "three of the predicate convictions at issue." (ECF Doc. 234, p. 9; App. A 0009). There was no evidence of record in the District Court to support the conclusion that the sentencing court considered that single conviction as three separate offenses. The government's unambiguous version of facts underlying the 1998 federal conviction as set out in the Pre-Sentence Investigation Report to the District Court confirm that none of the counts of that conviction involved the "use, attempted use, or threatened use of physical force." Specifically, according to the information *the United States Attorney's Office* gave the district court in support of the 1998 federal conviction, Mr. Mathis' conduct in carrying out the conduct at issue was described as follows:

1. September 22, 1997: the defendant entered the Parkvale Savings Bank, located at 3530 Forbes Avenue, Pittsburgh, and handed the teller a note that stated "Give me your money." The defendant also verbalized his demand to the teller.

2. October 16, 1997: the defendant returned to the Parkvale Savings Bank on Forbes Avenue and approached a different teller. Again, the defendant gave a demand note, which was written on a white folded piece of paper and read "Give me all your money."

3. October 27, 1997: the defendant entered the National City Bank at 1001 Liberty Avenue, Pittsburgh, and handed the teller a demand note which read "Give me the money."

[1] Grouped Counts Three and Six of the Superseding Indictment at the time of sentencing because the separate charges constituted the same act.

The full descriptions each described Mr. Mathis being provided with money, and leaving with it, but none of the descriptions indicated use of force. (PSIR, ECF Doc. 129, p. 25).

An individual can be convicted of 18 U.S.C. §2112(a) without having used, attempted to use or threatened to use physical force. The underlying conduct in the 1998 federal conviction, *as described by the government,* did not involve the "use, attempted use, or threatened use of physical force." The government did not object to any aspect of the PSIR in its Position with Respect to Sentencing factors, though the PSIR included the summary quoted from above which did not indicate the use, attempted use or threatened use of physical force. (ECF Doc. 141). Nor did the government's sentencing memorandum assert that the 1998 federal conviction should serve as three predicate offenses. (ECF Doc. 141). Although Mr. Mathis' trial counsel did not file a position with respect to sentencing factors or a sentencing memorandum, he also did not consider the 1998 federal conviction to constitute three predicate offenses under the ACCA.

In summary, at the time of sentencing in the underlying matter, neither the Superseding Indictment, nor the materials submitted to the court in advance of sentencing, posited the 1998 federal conviction as the three predicate ACCA offenses. The government did not espouse that theory until its Supplemental Reply to Mr. Mathis' Motion to Vacate, filed some 17 months after Mr. Mathis's *Johnson* claims. Further, the actual use of the 1998 federal conviction as the three predicate offenses was not fully articulated until the District Court, which was not the same Court that presided over Mr. Mathis' trials and sentencing, issued its August 31, 2017 opinion regarding Mr. Mathis §2255 Motion. (ECF Doc. 234).

A review of the sentencing transcript indicates that the Sentencing Court only considered the Superseding Indictment, PSIR, the government's position with respect to sentencing factors and sentencing memorandum, none of which articulated use of the 1998 federal conviction as the three predicate offenses. (Sent. Tr. ECF Doc. 179, p. 3; (App. A 0032). No other evidence was presented or argument made on the subject of predicate offenses at the time of sentencing.

The record contains no other statements by the Sentencing Judge, counsel for the United States, or Mr. Mathis' counsel arguing or implying that the 1998 federal conviction established three predicate ACCA offenses, yet the District Court sentenced Mr. Mathis under that statute to a mandatory sentence of 180 months. (EFC doc. 170, p. 13; (App. A 0023-0029).

It was plain error for the District Court – a different judge than who sentenced Mr. Mathis – to deny his *Johnson* claims. First, there was no factual or legal basis to three predicate ACCA offenses in his 1998 federal conviction. Second, the District Court made no findings at the time of sentencing to support this conclusion. Finally, underlying documentation provided to the court establishes that the 1998 federal conviction did not involve the "use, attempted use, or threatened use of physical force," and, therefore, would not have supported such a conclusion. As a result, Mr. Mathis was deprived of his constitutional due process right to challenge his sentence under *Johnson* and *Welch,* as the record indicates that the sentencing court likely relied upon the residual clause of the ACCA to impose Mr. Mathis' sentence.

Any argument that the Court *could have* relied on the use of force clause rather than the residual clause is not credible based on the facts set forth above. Moreover, a majority of courts that have considered this exact issue have held that "when unclear on which ACCA clause the sentencing judge rested a predicate conviction the petitioner's burden is to show only that the sentencing judge ***may have*** used the residual clause." *Wolf,* 2016 6433151 at *4 (emphasis added) (additional citations omitted).

Although Mr. Mathis also had two Pennsylvania robbery convictions in 1997, as referenced in the Superseding Indictment, there is no evidence to support the finding that the Court considered these convictions to qualify under the force clause of ACCA. The District

Court did not rely on those convictions to deny Mr. Mathis' Motion. Even if it had, there would have been no support for a finding by the sentencing court to be violent felonies under the force clause. While convictions under some subsections of the Pennsylvania robbery statute may qualify, convictions under others do not. *United States v. Harris*, 205 F.Supp.3d 651, 672. (M.D. Pa. 2016)

Pennsylvania's first-degree robbery statute, 18 Pa. Cons. Stat. §3701(a)(1)(i) – (iii), provides:

> (a) Offense defined. –
>
> (1) A person is guilty of robbery if, in the course of committing a theft, he:
>
> inflicts serious bodily injury upon another;
>
> threatens another with or intentionally puts him in fear of immediate serious bodily injury; [or]
>
> (iii) commits or threatens immediately to commit any felony of the first or second degree[.]

Accordingly, as relates to § 3701(a)(1)(iii), a person can be convicted under the Pennsylvania Robbery Statute without using force because some first and second-degree felonies are nonviolent. Where the record does not indicate that prior robbery convictions relied on subsections of the statute that qualified as violent felonies, the government cannot meet its burden to establish predicate ACCA felonies. *Harris* at 675.

In the proceedings below, no evidence established that the sentencing court determined that one or more of Mr. Mathis' Pennsylvania robbery convictions were violent crimes under the force clause as opposed to the residual clause. *Welch*, a seminal case on this topic is particularly instructive here. The petitioner there had a prior state conviction for "strong-arm robbery," yet his case was remanded for further review in light of the residual clause's invalidation. *Welch*, 136 S.Ct. at 1268. Here, the record is silent as to which definition of violent felony Mr. Mathis' prior federal and state court convictions met. This silence "should be read in favor of the petitioner, because the residual clause, written to be a capricious catch-all, was the most direct and efficient route to establishing an ACCA predicate." *Shabazz v. United States*, 2017 WL 27394, at *5 (D. Conn. Jan. 3, 2017) (additional citations omitted).

Requiring the defendant to show any more than that the Court ***may have*** relied on the residual clause "would render *Johnson* relief virtually impossible to obtain." *Shabaz*, 2017 WL 27394, at *5. As the District Court of District Columbia recently explained in *United States v. Brown*, ___ F.Supp.3d ___, No. 09-358, 2017; WL 1383640 at *3 (D. DC, April 12, 2017):

> This reduced burden makes sense for a number of reasons, including the fact that there was no practical reason for judges to identify whether they were relying upon the elements or residual clause prior to June 26, 2015, when the Supreme Court decided in Johnson that the residual clause was void for vagueness, because 'prior convictions that were not violent felonies under the elements clause often fell under the residual clause.'

Id. (additional citations omitted).

In the present case, there was no evidence of record to establish that Mr. Mathis was not sentenced pursuant to the now unconstitutional residual clause in violation of his due process rights. Accordingly, both in light of the erroneous reliance on the 1998 federal conviction, and the absence of findings outlined above, the District Court's denial of Mr. Mathis' motion, was clear error, and denied Mr. Mathis his constitutional right to due process under the Fifth Amendment.

At a minimum, in Mr. Mathis' application for Certificate of Appealability to the Court of Appeals, he made a substantial showing of the denial of a constitutional right, and has established that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong. 28 U.S.C. § 2253(c)(2). Specifically, he established that he was sentenced under the residual clause of ACCA, which pursuant to this Court's decision in

Johnson, supra, is unconstitutional. Accordingly, the Court of Appeals, should have granted a COA on this issue.

III. MR. MATHIS SHOULD HAVE BEEN GRANTED A CERTIFICATE OF APPEALABILITY REGARDING THE DISTRICT COURT REFUSAL TO EQUITABLY TOLL THE STATUTE OF LIMITATIONS ON MR. MATHIS' CONSTITUTIONAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Equitable tolling is applied when "principles of equity would make the rigid application of a limitation period unfair." *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012). It is to be applied "flexibly" and on a "case-by-case basis." *Id.*

Mr. Mathis' first filing in his *pro se* attempt to vacate his conviction and sentence was a "Motion for Continuance/ and Legal Counsel," dated October 28, 2015, made one year and 14 days following the Supreme Court's denial of Mr. Mathis' Petition for Writ of Certiorari, wherein he documented that there had been extenuating circumstances that adversely impacted his ability to prepare his request for legal relief. (App. A 0047-0050). Specifically, USP Big Sandy had been on modified movement status for a period of time in the months leading up to the anniversary of the denial of his Petition for Writ of Certiorari. The modified movement status impeded Mr. Mathis' access to the legal and related materials necessary to prepare a request for relief.

The Motion for Continuance/ and Legal Counsel attached an official memorandum from USP Big Sandy verifying modified movement during this critical period:

- July 27 – September 8, 2015
- October 6 – October 19, 2015
- October 22 – October 27, 2015

Mr. Mathis's was restricted 50 of the 79 days prior to the anniversary of the Court's denial of his Petition for Writ of Certiorari. Moreover, this modified movement status coincided with the 8 days *leading up to and including* the anniversary date, as well as 11 of the 13 days that followed the anniversary, culminating with his Motion for Continuance and Legal Counsel on October 28, 2015.

The District Court opted not to grant a hearing to allow Mr. Mathis to provide additional details and explanation, and yet found it "unclear how modified movement impacted Defendant's ability to prepare and file a Motion within the applicable time period," implying a lack of diligence on Mr. Mathis' part. (ECF Doc. 234, p. 5; (App. A 0050). In finding that Mr. Mathis did not act timely, the District Court concluded that the ineffective assistance of counsel claims "arose before and during trial in 2013," while neglecting to note that Mr. Mathis continued to be represented by the same counsel through his appeal.

The District Court essentially penalized Mr. Mathis for being unable to articulate precisely when he was notified of the Supreme Court's denial of certiorari in 2014, while at the same time acknowledging that there are "no documents in the record regarding" any notification by his prior counsel -- against whom Mr. Mathis alleged ineffective assistance in both his trial and appellate matters. The District Court's conclusions regarding both the impediments to Mr. Mathis filing a motion, and his diligence are both erroneous. The adoption and affirmance of these conclusions by the Court of Appeals as support for its denial of a COA was clear error.

"[T]o determine if a petitioner has been reasonably diligent, courts consider the petitioner's overall level of care and caution in light of his or her particular circumstances." *Munchinski*, 694 F.3d at 330 (additional citations omitted). "The diligence required of a habeas petitioner seeking equitable tolling is 'reasonable diligence, not maximum feasible diligence.'" *Id.* (additional citations omitted). Here, the record established that Mr. Mathis worked without the assistance of an attorney to apply for relief in a procedurally complex matter with prodigious sentencing implications. He filed a 24-page typed memorandum of law along with the petition, which included significant substantive arguments and factual assertions related to his two separate trials. Incredibly, the District Court was dismissive of the concept that the matters Mr. Mathis were difficult to navigate, stating, with no further analysis, that "the issues raised in Defendant's Motion are not overly complex." (ECF Doc. 234, p. 5).

Notwithstanding the District Court's summary conclusions, the criminal justice system *is* complicated for those without a legal background, and limited education of any kind. That Mr. Mathis was able to compile a competent and substantive petition within a few weeks of the deadline, of which (as discussed below) he may not have been aware, is a testament to his diligence in this matter. In addition, Mr. Mathis' inability to access legal resources because of USP Big Sandy's modified movement delayed completion of his petition. Mr. Mathis provided documentation of the modified movement status to the District Court as an exhibit to his request for a continuance. (ECF Doc. 199 at p. 3.) The District Court's rationale that it was "unclear" about the impact of modified movement is unavailing given that it could have held a hearing to gain clarity. But even without an evidentiary hearing, the letter and the context in which it was written demonstrated that Mr. Mathis was deprived of indispensable resources at a critical procedural point. He needed every day afforded him under the statute of limitations to draft his petition.

It was inappropriate for the District Court to find ambiguity in this set of facts while at the same time denying an evidentiary hearing that would have permitted them to be further developed. The affirmance by the Court of Appeals, was similarly erroneous. There was no dispute in the District Court that Mr. Mathis did not directly receive a copy of this Court's decision denying his Petition for Writ of Certiorari in October of 2014. Mr. Mathis does not possess any correspondence from his former counsel notifying him of the decision, nor did Mr. Mathis' former counsel have records confirming correspondence with Mr. Mathis about the denial. Without receipt of that communication from his counsel, upon whom Mr. Mathis relied to inform him of the status of his case, Mr. Mathis did not know that the statute of limitations had been triggered.

Given that Mr. Mathis' ineffective assistance claim included an allegation that his relationship with counsel had broken down, the District Court' treatment of the facts regarding notification of the denial of certiorari as either irrelevant – or worse – as attributable to Mr. Mathis' negligence or lack of diligence is troubling. Considering Mr. Mathis' demonstrated diligence in preparing and filing his habeas petition; the circumstances that caused him to file his petition late; and the fact that his petition was only filed a short time outside the statute of limitations, in combination with Mr. Mathis' 600 month sentence and the corresponding extreme prejudice he faces, the balance of the equities weighed in favor of equitable tolling in this matter.

The District Courts denial of Mr. Mathis' motion, in light of these underlying facts, was clear error, and denied Mr. Mathis his constitutional right to due process under the Fifth Amendment, and effective assistance of counsel under the Sixth Amendment. Given that the Court of Appeals affirmed the District Court's decision by denying his right to appeal with essentially no further comment, its decision is similarly erroneous, as it must be presumed to be based on the same flawed reasoning. At a minimum, Mr. Mathis made a substantial showing of the denial of a constitutional right, and established that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. 28 U.S.C. § 2253(c)(2). Accordingly, Mr. Mathis should have been granted a COA on this issue, and the Court of Appeals' decision in this regard should be reversed.

IV. THE COURT OF APPEALS SHOULD HAVE GRANTED A CERTIFICATE OF APPEALABILITY REGARDING THE DISTRICT COURT'S REFUSAL TO GRANT AN EVIDENTIARY HEARING

The obligation of the district court to grant an evidentiary hearing in matters such as this is unambiguous:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

28 U.S.C. §2255(b).

An evidentiary hearing on a motion to vacate, set aside, or correct a sentence is required unless the record conclusively shows that the defendant is not entitled to any relief. *Campbell v. United States,* 686 F.3d 353, (6th Cir. 2012).

To serve the ends of justice, a defendant is entitled to an evidentiary hearing in the context of a motion to vacate sentence, to determine both whether equitable tolling applied to one-year limitations period, and if so, whether defendant was entitled to relief on the merits of Due Process Clause and ineffective assistance claims, particularly where it is necessary to develop complicated facts underlying the claim. *See Ramos-Martinez v. United States*, 638 F.3d 315 (1st Cir. 2011). Mr. Mathis was entitled to an evidentiary hearing on a number of meritorious claims raised in his initial petition and addressed again in detail in the Supplement to Defendant's Pro Se 2255 Motion (EFC doc. 210). These claims include trial counsel's ineffective assistance for failing to raise the clear conflict of interest and potential for prejudice apparent in Mr. Mathis's trial by his former criminal defense attorney; failing to request instructions on lesser included offenses and to object to inadequate instructions; and failing to communicate properly about potential sentences and opportunities for plea negotiations.

In both the District Court and the Court of Appeals below, Mr. Mathis also presented meritorious claims for ineffective assistance of appellate counsel for failing to brief and argue relevant issues. The Fifth Amendment of the U.S. Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law. The Sixth Amendment provides the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Mr. Mathis' ineffective assistance claim asserts that the trial judge in the District Court, the late Judge Gary L. Lancaster, had previously represented Mr. Mathis in another criminal matter during the course of which Judge Lancaster gained personal information about Mr. Mathis and disputed with him over payment. Mr. Mathis alleged in his motion that trial counsel refused his specific requests move for Judge Lancaster's recusal based on the conflict of interest and Judge Lancaster presided over the trial and ruled on key pretrial motions, including those relating to suppression and admissibility of evidence. Mr. Mathis also asserted that his trial counsel refused to ask for a jury instruction on lesser included offenses and reasonable doubt; that the evidence in the second trial did not include conclusive identification or eyewitness testimony to connect Mr. Mathis to the robbery at issue there; that the instructions given in each trial broadened the possible bases for conviction, which counsel permitted to lead to convictions based on insufficient evidence; and that trial counsel did not object to the trial court's failure to use model jury instructions on the issues of Presumption of Innocence; Burden of Proof; Reasonable Doubt. Mr. Mathis asserted that if counsel had properly pursued these issues and provided effective assistance of counsel there would have been a different outcome at trial. Mr. Mathis also asserted that his relationship with trial counsel broke down for various reasons, resulting in irreconcilable conflicts with counsel, which created a rancorous and hostile relationship. He was deprived of the opportunity to develop the record of these claims at an evidentiary hearing, and subsequently denied any right to appeal.

Mr. Mathis claimed further that his trial counsel was ineffective in the plea bargaining process, asserting that he told trial counsel he would accept responsibility for his role in the case and requested that counsel pursue limited plea negotiations. He described discussions about potential plea negotiations and asserted facts that indicated that he was given a false choice and an incomplete picture of the details of this case. He also asserted that but for counsel's performance he would have foregone a trial and entered a guilty plea. Mr. Mathis claimed that this conduct fell below any reasonable effective assistance in the plea bargaining process and guarantees of the Sixth Amendment. *See Missouri v. Frye*, 132 S.Ct. 1399, 144 (2012). Mr. Mathis asserted that appellate counsel, with whom Mr. Mathis already had an irreconcilable breakdown at trial, refused to argue meritorious issues by rejecting requests Mr. Mathis made during the appeal process.

If he had been granted a hearing, Mr. Mathis could have presented evidence to demonstrate errors so serious as to prove that counsel was not functioning as that which the Fifth and Sixth Amendments guarantee, including the following:

a. Failure to address insufficient evidence, and the fact that a witness at the initial trial gave false testimony; and failure to address these issues at trial;

b. Failure of appellate counsel to argue that the jury was properly instructed regarding inconsistent and false testimony of government witnesses;

c. Prejudice that resulted from the absence of any substantive discussion with appellate counsel about the issues to be raised.

In the context of the District Court's denial of an evidentiary hearing on his ineffective assistance claims, it is noteworthy that the District Court docket reflects that no sentencing memorandum was ever filed on behalf of Mr. Mathis – in a case where Mr. Mathis would ultimately be sentenced to 600 months in prison.

The District Court's denial of Mr. Mathis' motion, in light of these underlying facts, was clear error, and denied Mr. Mathis his constitutional right to due process under the Fifth Amendment and effective assistance of counsel under the Sixth Amendment. That issue, however, need not be resolved at this time. What must be resolved is the Court of Appeals' erroneous denial of Mr. Mathis of a COA on these issues. Mr. Mathis made a substantial showing of the denial of a constitutional right, and established that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong. 28 U.S.C. §

2253(c)(2). Accordingly, Mr. Mathis should have been granted a COA on this issue, and the Court of Appeals erroneous decision to summarily deny his application should be resolved.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted so that petitioner can pursue his meritorious request that the decision of the Court of Appeals be reversed, and that he be issued a Certificate of Appealability.

Respectfully submitted,

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