No. 16-9604

IN THE SUPREME COURT OF THE UNITED STATES

TREVON SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

KENNETH A. BLANCO
Acting Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Missouri's second-degree burglary statute, Mo. Ann. Stat. § 569.170 (West 1999), is divisible into two offenses with separate elements for purposes of analyzing whether a conviction under that statute qualifies as a conviction for a "violent felony" as defined in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-9604

TREVON SYKES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 844 F.3d 712. A prior opinion of the court of appeals is reported at 809 F.3d 435.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2016. A petition for rehearing was denied on March 17, 2017 (Pet. App. C1-C5). The petition for a writ of certiorari was filed on June 14, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Missouri, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. B1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at B2-B3. The court of appeals affirmed. 809 F.3d 435. This Court subsequently granted certiorari, vacated the judgment, and remanded to the court of appeals for further consideration in light of Mathis v. United States, 136 S. Ct. 2243 (2016). 137 S. Ct. 124. On remand, the court of appeals again affirmed. Pet. App. A1-A8.

1. In May 2013, petitioner and a confederate sold a semi-automatic pistol to federal undercover agents posing as "convicted felons who were buying guns for unlawful use by an outlaw motorcycle gang." Pet. App. A2. Over the ensuing weeks, petitioner sold five more firearms (two of which were stolen) to the undercover agents. Id. at A3. Petitioner was subsequently charged with, and pleaded guilty to, possession of a firearm by a felon. Ibid.

2. The Presentence Investigation Report (PSR) noted, inter alia, that petitioner's prior convictions include three convictions for Missouri second-degree burglary and one conviction for Missouri first-degree burglary. Pet. App. A3; see also PSR

¶¶ 68-70. Based on those prior convictions, the PSR concluded that petitioner was subject to an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). 809 F.3d at 437; PSR ¶ 111. As relevant here, the ACCA provides for a sentence of 15 years to life imprisonment for certain offenders who have three prior convictions for a "violent felony," defined to include "burglary" punishable by more than one year in prison. 18 U.S.C. 924(e)(1) and (2)(B)(ii). Without the enhancement, petitioner would have been subject to a statutory maximum of 120 months of imprisonment. See 18 U.S.C. 924(a)(2).

Petitioner objected to the PSR, contending, as relevant here, that because his second-degree burglary convictions involved unoccupied commercial buildings and were otherwise nonviolent, they did not qualify as "burglary" under the ACCA or otherwise constitute ACCA predicates. 809 F.3d at 437. The district court disagreed and sentenced petitioner to the ACCA-enhanced mandatory minimum sentence of 180 months of imprisonment. See id. at 437-438.

Petitioner appealed. He argued, among other things, that his three prior Missouri second-degree burglary convictions did not qualify as "burglary" under the ACCA because "the Missouri second-degree burglary statute is overbroad." 809 F.3d at 438. The court of appeals rejected that argument and affirmed. Id. at 438-439.

In October 2016, this Court granted certiorari, vacated the judgment, and remanded to the court of appeals for further consideration in light of Mathis, supra, which addressed the circumstances in which a court may examine the records of a prior conviction in determining whether it qualifies as a violent felony under the ACCA. 137 S. Ct. 124.

3. On remand, the court of appeals again affirmed. Pet. App. A1-A8. The court explained that "[t]o determine whether a past conviction qualifies as a violent felony" under the ACCA, "we apply the 'categorical approach,' under which we 'look only to the fact of conviction and the statutory definition of the prior offense.'" Id. at A4 (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)). "If the statute of conviction lists elements in the alternative," the court continued, "the sentencing court may apply the 'modified categorical approach,' under which 'a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.'" Ibid. (quoting Mathis, 136 S. Ct. at 2249). The court further explained that "[a]n offense constitutes 'burglary' under [the ACCA] if it contains the elements of 'generic burglary,' which is defined as 'unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'" Id. at A5 (quoting Taylor, 495 U.S. at 598).

The court of appeals observed that under Missouri law, "a person commits second-degree burglary when 'he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.'" Pet. App. A5 (emphasis added) (quoting Mo. Ann. Stat. § 569.170 (West 1999)). The term "inhabitable structure," in turn, includes a "ship, trailer, sleeping car, airplane, or other vehicle or structure." Ibid. (quoting Mo. Ann. Stat. § 569.010(2) (West 1999)). Citing Mathis, 136 S. Ct. at 2258, the court determined that it could apply the modified categorical approach to petitioner's convictions under the statute because section 569.170 is divisible into two offenses. Pet. App. A5. The court reasoned that the statute "contains at least two alternative elements: burglary 'of a building' and burglary of 'an inhabitable structure,' separated in the text by the disjunctive 'or.'" Ibid. ("[B]ecause burglary of 'a building' describes an element of second-degree burglary rather than a means, our decision does not run afoul of Mathis." (citing Mathis, 136 S. Ct. 2253)).

The court then applied the modified categorical approach and found, with no dispute from petitioner, that the indictments underlying his prior second-degree burglary convictions showed that the convictions involved the burglary of "buildings." Pet. App. A4-A5. And it determined that those convictions were ACCA predicates because "[s]econd-degree burglary of a building

conforms to the elements of a generic burglary promulgated in Taylor." Id. at A5 (citing Taylor, 495 U.S. at 598).

4. The court of appeals denied rehearing en banc, over the dissent of four judges. See Pet. App. C1-C5. The dissenting judges believed that more analysis was needed to support the panel's "crucial" determination that burglary of a "building" and burglary of "an inhabitable structure" are elements of separate offenses rather than alternative means of committing a single offense. Id. at C2-C4.

ARGUMENT

Petitioner contends (Pet. 6-12) that the court of appeals erred in its determination that Missouri's second-degree burglary statute defines two offenses. The court's resolution of that state-law question is correct, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Under Mathis v. United States, 136 S. Ct. 2243 (2016), the determination whether a prior state-law conviction constitutes a conviction for "burglary" as that term is used in the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), may require an analysis of whether the statute of conviction is "divisible" into multiple offenses. Mathis, 136 S. Ct. at 2249. In particular, where the statute is "alternatively phrased" such that it criminalizes some conduct that would qualify as burglary under the ACCA and some conduct

that would not, a court must determine "whether its listed items are elements" of separate offenses or instead just different "means" of committing a single unified offense. Id. at 2256. "If they are elements, the court should * * * review the record materials to discover which of the enumerated [offenses] played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of 'generic [burglary].'" Ibid. "But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution," ibid., and the statute's criminalization of conduct outside the definition of generic burglary precludes classifying a conviction under the statute as a "burglary" conviction under the ACCA.

Petitioner does not dispute that, if Missouri's second-degree burglary statute is divisible, his three prior convictions under that statute would qualify as ACCA predicates. That is because the record materials for those convictions illustrate that the convictions were for burglary of a building, which constitutes generic burglary. Petitioner disputes only the threshold question of divisibility. Although federal courts must decide that question in the context of applying the ACCA, it is fundamentally a question of state law. As such, it does not warrant this Court's review. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state

law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see also, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004). Review is particularly unwarranted here, where petitioner does not allege that the decision below conflicts with a decision from any other court of appeals. Indeed, no court of appeals has held that the Missouri second-degree burglary statute is indivisible, and petitioner does not argue that the courts of appeals are divided regarding similar state-law provisions. Pet. 6-12.

2. a. In any event, the court of appeals' determination was correct. The Missouri second-degree burglary statute states that "[a] person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Ann. Stat. § 569.170(1) (West 1999) (emphasis added). No decision of the Supreme Court of Missouri definitively resolves the question whether "building" and "inhabitable structure" are elements or means. See Mathis, 136 S. Ct. at 2256 (stating that where a "definitive" state court ruling exists, "a sentencing judge need only follow what it says"). In State v. Yacub, 976 S.W.2d 452 (1998) (en banc) (per curiam), however, the Supreme Court of Missouri strongly suggested that "building" and "inhabitable structure" are alternative elements

that the prosecution must plead and prove. There, the State charged the defendant with second-degree burglary of "an inhabitable structure," and the defendant argued that the house was not inhabitable because significant repairs were underway. Id. at 452-453. The court stated that "[b]y charging defendant with entering an inhabitable structure, the state assumed the burden of proving the house was an inhabitable structure," and it found that the State had met its burden. Id. at 453. Requiring the prosecution to prove that the burglarized house was, in fact, an "inhabitable structure" strongly suggests that "building" and "inhabitable structure" are alternative elements. Cf. Mathis, 136 S. Ct. at 2248 (elements are "the things the prosecution must prove to sustain a conviction") (citation and internal quotation marks omitted).

The other indicia of state law that Mathis identifies as potentially relevant to the divisibility analysis similarly support the court of appeals' decision here. See 136 S. Ct. at 2256-2257. First, Mathis states that "jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements." Id. at 2257. That is the case here. Missouri's model jury instruction for second-degree burglary -- which courts must use, see State v. Anderson, 306 S.W.3d 529, 534 (Mo.) (en banc), cert. denied, 562 U.S. 931 (2010) -- states that, to find a defendant guilty,

the jury must "find and believe from the evidence beyond a reasonable doubt" that "the defendant knowingly (entered) (remained) unlawfully (in) (a building) (an inhabitable structure) located at [location] and (owned) (possessed) by [name of owner or possessor]." MAI-CR 323.54 (3d ed. 1998) (MAI-CR). That the model instruction envisions the burglary of "a building" or "an inhabitable structure," but not both, supports the conclusion that "building" and "inhabitable structure" are separate elements. See Mathis, 136 S. Ct. at 2257.[1]

Second, Mathis states that "an indictment * * * could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements." 136 S. Ct. at 2257. Here, Missouri's approved charging language suggests that "building" and "inhabitable structure" are elements, because it requires a choice between the two. See MACH-CR 23.54 (1998) (stating, in relevant part, that "the defendant knowingly (entered) (remained) unlawfully in (a building) (an inhabitable structure) * * * for the purpose of committing [a crime] therein"). And case law likewise indicates that indictments under

---

[1] Petitioner suggests that the model instruction supports his view because, according to the "How to Use This Book" section of the MAI-CR, "parentheses enclose words or phrases that will be either omitted or included, depending upon the facts of the case being submitted." Pet. 10 (emphasis added). But nothing in the introductory note suggests that a jury instruction could or should include both "building" and "inhabitable structure" as alternative means of committing a single offense.

state law generally charge that a defendant unlawfully entered or remained in a "building" or an "inhabitable structure," but not both. See, e.g., Yacub, 976 S.W.2d at 453 ("The state charged defendant with entering an inhabitable structure."); State v. Allen, 508 S.W.3d 181, 186 (Mo. Ct. App. 2017) ("The State charged Allen with knowingly and unlawfully entering the VCR Building.").

Finally, Mathis states that federal courts may "peek" at "the record of a prior conviction itself" to "determin[e] whether the listed items are elements of the offense." 136 S. Ct. at 2256 (brackets and citation omitted). Here, the records of petitioner's prior second-degree burglary convictions further support the court of appeals' holding that "building" and "inhabitable structure" are elements rather than means. In connection with each of petitioner's three second-degree burglary convictions, the State charged that he "knowingly entered unlawfully [in] a building, located at * * * for the purpose of committing" a crime therein. PSR ¶¶ 68-70; see also 1022-CR00974 Indictment at 1 (Mo. Cir. Ct. May 26, 2010); 0922-CR05542 Indictment at 1 (Mo. Cir. Ct. Dec. 21, 2009).[2]

---

[2] In State v. Smith, No. SC 95461, 2017 WL 2952325 (July 11, 2017) (en banc), the Supreme Court of Missouri described second-degree burglary as having "only the first two elements" of the greater, first-degree burglary offense: "(1) a knowing unlawful entry into a building or inhabitable structure; (2) with an intent to commit a crime therein." Id. at *5. The court's discussion in Smith focused on distinguishing first-degree burglary from second-degree burglary, and the defendant in that case did not raise any argument regarding the distinction between

b. Petitioner contends (Pet. 7-9) that Missouri case law establishes that "building" and "inhabitable structure" are means, not elements. But as just discussed, the Supreme Court of Missouri's decision in Yacub strongly suggests that "building" and "inhabitable structure" are elements, and the model jury instructions and charge, as well as the documents in petitioner's own case, support that conclusion. Instead of addressing Yacub, petitioner relies (ibid.) on two decisions from the Missouri Court of Appeals. Those decisions cannot take precedence over the Supreme Court of Missouri's decision in Yacub, and in any event, they do not resolve the question presented here.

In State v. Pulis, 822 S.W.2d 541 (Mo. Ct. App. 1992) (cited at Pet. 7-8), the defendant moved for a judgment of acquittal on the ground that the "greenhouse" he was accused of burglarizing was not a "building" under the burglary statute. 822 S.W.2d at 542-543. In rejecting that claim, the court explained that because second-degree burglary "can be committed by unlawfully entering either a building or an inhabitable structure, we need not determine whether the greenhouse was a 'building' if it meets the statutory definition of 'inhabitable structure.'" Id. at 544; see id. at 545. But Pulis predates the Supreme Court of Missouri's decision in Yacub, which is binding on the Missouri Courts of

---

a building and an inhabitable structure. Ibid. Smith thus did not consider or determine whether "building or inhabitable structure" are elements or means.

Appeals. And in the absence of an explanation of how the defendant there was charged or how the jury was instructed, the probative value of Pulis is substantially limited.

In State v. Washington, 92 S.W.3d 205 (Mo. Ct. App. 2003) (cited at Pet. 8), the defendant stole items from a garage attached to a home in which two individuals were present. 92 S.W.3d at 206-207. He was convicted of Missouri first-degree burglary, which requires proof that the defendant "knowingly enter[ed] unlawfully or knowingly remain[ed] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein" while "there [was] present in the structure another person who [was] not a participant in the crime." Id. at 208 (brackets omitted) (quoting Mo. Ann. Code § 569.160.1(3) (West 1999)). The court of appeals reversed the conviction. It explained that "a person may commit first degree burglary in either a building or an inhabitable structure" and that, because the jury instructions "referred only to the burglary of an inhabitable structure," the State was required to prove that the garage was "such a structure." Ibid. (citing Yacub, 972 S.W.2d at 453). The court held that the garage was not an "inhabitable structure" and did not qualify "as a part of the home's inhabitable structure" because there was no internal door connecting it to the house. Id. at 209 (emphasis omitted). Accordingly, the court concluded that "the State failed to prove that [the defendant] and another person were present in [the

inhabitable] structure, as required for a first degree burglary conviction." Id. at 210.

The court of appeals went on, however, to exercise its authority to enter a conviction for the lesser-included offense that the evidence did support -- namely, a second-degree burglary offense, which did not require proof of an innocent person's presence in the burglarized location. Washington, 92 S.W.3d at 210-212. The court explained that the evidence was sufficient to establish that the garage was a "building" and that "[t]he jury's finding" on the first-degree burglary count "in this case necessarily supposes that [the defendant] burglarized a building" because "the term 'building' encompasses the term 'inhabitable structure' in this case.'" Id. at 210-211. Although petitioner relies on this portion of Washington (Pet. 8), it does not support his argument. The court's determination in that particular case that the evidence was sufficient to support a lesser-included offense of second-degree burglary of a building -- a determination that did not depend on how the jury was instructed on the first-degree burglary offense -- does not suggest that "building" and "inhabitable structure" are interchangeable within the context of a specific second-degree burglary charge. Indeed, any interpretation of Washington as determining that "building" and "inhabitable structure" are means would be in tension with the decision's holding on the first-degree burglary charge that "[b]y

charging [the defendant] with entering an inhabitable structure, the State assumed the burden of proving that the * * * garage was such a structure." Id. at 208 (citing Yacub, 976 S.W.2d at 453).

3. This Court's review would be particularly unwarranted because the Eighth Circuit itself recently decided to consider en banc the question presented here. In United States v. Naylor, 682 Fed. Appx. 511 (8th Cir. 2017) (per curiam), the court of appeals, relying on the decision below, held that Missouri second-degree burglary qualifies as an ACCA predicate. Id. at 513. On May 22, 2017, roughly three weeks before the petition in this case was filed, the Eighth Circuit granted the defendant's petition for rehearing en banc, vacated its earlier decision, and set the case for argument before the en banc court in September 2017. See 16-2047 Order.[3] The question presented will thus be definitively resolved without this Court's intervention in the only circuit in which it would frequently arise.

[3] To the extent that it might be appropriate to hold this petition pending the court of appeals' decision in Naylor, petitioner has not requested that the Court do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

KENNETH A. BLANCO
Acting Assistant Attorney General

ROSS B. GOLDMAN
Attorney

SEPTEMBER 2017