NO. 16-9604

IN THE SUPREME COURT OF THE UNITED STATES

_____, 2017

Trevon Sykes - Petitioner

vs.

United State of America - Respondent.

PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Petitioner's Trevon Sykes, through his appointed attorney, Levell D. Littleton, replies to the Government's Response in Opposition to Petitioner's Petition For Writ Of Certiorari states as follows:

1. Acknowledging that the Eighth Circuit's decided a question of Missouri law without reference to any Missouri case law, the government concedes that the Missouri Court of Appeals' decision in *State v. Pulis,* 822 S.W.2d 541 (Mo. Ct. App. 1992), "would have force if we knew that Pulis was charged *only* with burglary of a building:. But, we do. He was. The amended information,[1] attached as Exhibit A to this response, explicitly charges Pulis unlawfully

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[1] This pleading from the Pulis case was submitted as Exhibit A to Movant Willie Johnson's Reply Suggestions in *Johnson v. United States,* No. 4:16 CV 649

entering "a building located at 425 W. Commercial, Springfield, Missouri." *See* Addendum A at 1. The words "inhabitable structure" appear nowhere in this charging document.

2. The government's attempt to distinguish *State v. Washington,* 92 S.W.3d 205 (Mo. Ct. App. 2002), is self-refuting. Conceding that Washington did not burgle an "inhabitable structure" as charged, the government quotes the Missouri court's conclusion that "'there was sufficient evidence from which a jury could determine that the garage by itself was a building'" and "'[t]he jury's finding that 'defendant' burglarized an inhabitable structure *in this case* necessarily supposes that he burglarized a building.'" *State v. Washington,* 92 S.W.3d at 209-10. Obviously, the jury did not have to agree unanimously whether Washington burglarized a "building" or an "inhabitable structure." Some of the jurors could have believed one alternative and some the other, but the evidence sufficed without unanimous agreement. Such indeterminacy establishes that the alternatives Missouri's burglary in the second-degree statute, "building" or "inhabitable structure" are means of committing the offense, **not** elements. Unless a jury has to agree unanimously about a fact, it is not an element. *See Mathis v. United States,* 136 S. Ct. 2243, 2249 (2016); *Descamps v. United States,* 33 S. Ct. 2276, 2283, 2288, 2290 (2013).

3. The government's reliance on *State v. Yacub,* 976 S.W.2d 452 (Mo. 1998), is also self-refuting because the government is citing to dicta. Furthermore, *Yacub* nowhere addresses the question whether the phrase "building or inhabitable structure" states means or elements. Rather, the Court dealt only with Yacub's effort to have the term "inhabitable structure" judicially amended to mean "inhabited structure." *See* 976 S.W.2d at 453.

NKL, docket number 11. This Court may take judicial notice of this filing. As Sykes noted in his Petition for Writ of Certiorari, this document is available to the public.

4. Choosing to ignore Missouri case law, the government instead focuses on the Missouri second-degree burglary statute's language. But, beguiled by the disjunctive simplicity of the Missouri statute's use of the short phrase "building or inhabitable structure," the government, like the *Sykes* panel, rushes to a result that falls apart when analyzed through the lens provided in *United States v. Edward,* 836 F.3d 831, 836 (7th Cir. 2016), which considered the Wisconsin burglary statute's more detailed list of specific, disjunctive alternatives and found them to be means rather than elements. *See id.* at 838. If "building" and "inhabitable structure" in the Missouri statute are separate elements, then a single entry into a place that qualified as both a "building" and an "inhabitable structure" would permit the state to charge multiple counts of burglary. *See id.* at 836. Nothing about the statute or Missouri case law suggests that a single entry should be so consequential. Indeed, Missouri's pattern jury instructions lead to the opposite conclusion. *See Small v. United States,* 2016 WL 4582068 at *3-*4 (W.D. Mo. Sept. 2, 2016) (analyzing Missouri pattern instructions as one basis for finding that "building" and "inhabitable structure" are means of committing burglary). Contrary to the government's argument in its response, these pattern instructions lead to the conclusion that the alternatives in the Missouri statute are means, not elements. *See id.*

Conclusion

For the reasons offered in this reply and in Sykes's Petition for Writ of Certiorari, he respectfully requests that the Court grant his petition.

Dated October 10, 2017

Respectfully submitted,

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