NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____, 2017

Trevon Sykes - Petitioner

vs.

United State of America - Respondent.

**PETITION FOR WRIT OF CERTIORARI**

Levell D. Littleton
Attorney for Petitioner
1221 Locust, Suite 310
St. Louis, MO 63103
Telephone 314-231-3168
Fax 314-231-4072
E-mail: levelllittleton@cs.com

ATTORNEY FOR PETITIONER

## QUESTION PRESENTED

Whether the Missouri crime of Burglary in the 2nd degree of commercial buildings, is a violent crime, under the Armed Career Criminal Act, 18 U.S.C. § 924(e)

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 2017

---

Trevon Sykes - Petitioner

vs.

United State of America - Respondent.

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

---

The Petitioner, Trevon Sykes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 14-3139, entered on December 28, 2016. Rehearing en banc was denied March 17, 2017.

## OPINION BELOW

On December 28, 2016 a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Eastern District of Missouri. The opinion of the Court of Appeals is reported as *United States v. Sykes* 14-3149

## JURISDICTION

The Court of Appeals entered its judgment on December 28, 2016. On March 17, 2017, the Court of Appeals denied the Petitioner's request for rehearing and rehearing en banc. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(e)(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 an element the use, attempted use, or threatened 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; . . . (Emphasis added).

Missouri Revised Statute § 569.170 (2014) (burglary in the second-degree):

> 1. 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. (Emphasis added).

2. Burglary in the second degree is a class C felony.

Missouri Revised Statute § 569.010 (2014) (defining "inhabitable structure"):

(2) "Inhabitable structure" includes a ship, trailer, sleeping car, airplane, or other vehicle or structure:
(a) Where any person lives or carries on business or other calling; or
(b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
(c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present;

Missouri Revised Statute § 569.010 (2014) (defining "enter unlawfully or remain unlawfully"):

(8) "Enter unlawfully or remain unlawfully", a person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. *A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege* unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. (Emphasis added).

## STATEMENT OF THE CASE

On April 29, 2014, the Petitioner pled guilty to being a felon in possession of one or more firearms in violation of 18 U.S.C. § 922(g)(1). Brief of Petitioner-Appellant at V*, United States v. Sykes*, No. 14-3139 (8th Cir. Sept, 25, 2015). The probation officer responsible for preparing the Petitioner's pre-sentence report determined that Petitioner had three prior burglary convictions, all of commercial buildings, and some when he was a juvenile and certified as an adult, subjected him to the Armed Career Criminal Act ("ACCA") pursuant to 18 U.S.C. §

924(e)(1). *Id.* Petitioner objected to being classified as an Armed Career Criminal. Petitioner argued that his prior second-degree burglary convictions did not pose "a serious potential risk of physical injury to another" as the offenses were committed while Petitioner was a juvenile, unarmed and they were of commercial buildings open to the public at the time of commission. Moreover, Petitioner argued that Congress did not intend for non-violent burglaries of commercial dwellings, from an individual, who is unarmed, to be used as a predicate conviction for the ACCA. As such, Petitioner's argument noted that the residual clause of the Act could not be used to classify his offenses as crimes of violence or violent felonies and therefore should not qualify as predicate convictions for ACCA purposes.

After hearing arguments on the issue, the District Court rejected Petitioner's arguments and applied the ACCA enhancement. The Court sentenced Petitioner to 180 months (15 years) imprisonment. On appeal, the Petitioner argued that the Missouri crime of Burglary in the 2nd degree is overbroad because it can be committed by one entering a commercial building or can be achieved by the different definitions for inhabitable structure, i.e. vehicle, aircraft, etc. *See Brief of Petitioner Sykes and Mo. Rev Statute 569.010*. The Eighth Circuit concluded that the Petitioner's prior convictions for unarmed second-degree burglary of commercial buildings "largely" fit within the "generic definition" of burglary" for purposes of the ACCA and that each constitutes a violent felony under 18 USC § 924(e). The Court further held that since Sykes did not contest that he burgled commercial buildings, the Government did not have to introduce Shepard or Taylor documents to ascertain what he burgled. See Opinion of U.S. Court of Appeals, *United States v. Sykes*, No. 14-3139 (8th Cir. Jan. 4, 2016).

In determining whether Petitioner's prior burglary convictions met the ACCA requirements as set out in *Taylor v. United States*, 495 U.S. 575, 599, 110 S.Ct. 2143, 109 S. Ct

2143, 109 L. Ed. 2d 607 (1990), the Eighth Circuit relied on what this Court deemed Congress must have reasoned, concluding that certain categories of property crimes *carry inherent risks of injury to persons*, and are typically committed by career criminals, such that they should be enumerated in the enhancement statute. *Sykes*, No. 14-3139 at 4. The Court further opined that although the Supreme Court held that imposing an increased sentence under the residual clause of 18 USC § 924(e) is unconstitutional, because "burglary" is an enumerated offense under the ACCA and is included in the definition of violent felony as set out in the Act, the imposition of an increased sentence need not rest on whether Petitioner's conduct posed "a serious potential risk of physical injury to another." *Id.* Petitioner subsequently filed a Petition for Rehearing and Rehearing Enbanc, which was denied.

The Petitioner, then, filed a Petition for Certiorari with the United States Supreme Court. On October 3, 2016 This Court granted the Petitioner's Petition for Certiorari and vacated the judgment of the Eight Circuit for more consideration in light of the Court's holding in *Mathis vs. United States 579 U.S._____( 2016) See Sykes vs. United States; 15-9716*. Pursuant to this Court's order, the Eighth Circuit held additional briefings regarding the matter. On, December 28, 2016 the Eighth Circuit again held that the Missouri Crime of 2nd Degree Burglary of commercial buildings, without the use of a weapon, was a crime of violence for ACCA purposes. The Eighth Circuit Court reasoned that Sykes' case did not run afoul of *Mathis* because at least two alternatives elements; burglary of building and burglary of an "inhabitable structure" is separated in text by the disjunctive "or". The Eighth Circuit's opinion does not cite one (1) Missouri case or any Missouri state court materials in support of its opinion. Petitioner requested rehearing and rehearing Enbanc from the Eighth Circuit. On March 17, 2017, in a 5 to 4

decision, the Eight Circuit denied Petitioners request for rehearing and rehearing En banc. *See United States vs. Sykes, No. 14-3139; Published Order of March 17, 2017.*

Petitioner respectfully submits that the Eighth Circuit erred when holding that the Missouri Statue is consistent with the generic definition outlined in *Taylor* and consistent with this Court's holding in *Mathis*. Petitioner submits, after review of the appropriate state court materials, it is abundantly clear that the Missouri Statue of Burglary in the 2nd degree sweeps more broadly than generic burglary because of the wide ranging inhabitable structure element and as such is categorically prohibited under *Mathis* to be used as a ACCA predicate.

## REASONS FOR GRANTING THE WRIT

### I. THE EIGHTH CIRCUIT COURT PURPORTED TO RESOLVE THE STATE-LAW QUESTION WHETHER THE MISSOURI SECOND-DEGREE BURGLARY STATUTE'S LOCATIONAL ELEMENT CONSISTS OF ALTERNATIVE "MEANS" OR "ELEMENTS" WITH NO REFERENCE TO ANY MISSOURI CASELAW, CONTRARY TO THE SUPREME COURT'S EMPHASIS IN *MATHIS* ON THE INDISPENSIBLE ROLE OF STATE LAW IN DETERMINING WHETHER STATUTORY ALTERNATIVES WERE "MEANS" OR "ELEMENTS."

Missouri defines second-degree burglary as the unlawful entry into "a building or inhabitable structure" for the purpose of committing a crime.[1] Whether this statute has elements that "are the same as, or narrower than, those of the generic offense"[2] of burglary as defined in *Taylor v. United States,* 495 U.S. 575, 598 (1990), depends on whether the phrase "building or inhabitable structure" "sets out a single (or 'indivisible')" element or "list[s] elements in the

---

[1] *See* Mo. Rev. Stat. § 569.170.1. Knowingly remaining unlawfully in a "building or inhabitable structure" for the purpose of committing a crime also qualifies as second-degree burglary. *See id.*

[2] *Mathis,* 136 S. Ct. at 2247.

alternative, and thereby define[s] multiple crimes."[3] This issue is a question of Missouri law, just as the question concerning the meaning of the Iowa burglary statute's locational element, "occupied structure," was a question of Iowa law.[4] The *Mathis* Court relied on Iowa caselaw.[5] Yet, in asserting that Missouri's statute "contains at least two alternative elements: burglary 'of a building' and burglary of 'an inhabitable structure,'" the panel cites no Missouri caselaw,[6] although Sykes alerted the panel to Missouri cases that unambiguously hold that the phrase "building or inhabitable structure" constitutes a single, indivisible element.[7]

**A. Missouri case law establishes that the phrase "building or inhabitable structure" states a single, indivisible locational element.**

Missouri case law establishes that the phrase "building or inhabitable structure" as used in Missouri's burglary statute[8] is a single, indivisible element. In *State v. Pulis,*[9] the Missouri Court of Appeals held that it was irrelevant whether the state had proved that Pulis burgled a "building," as the indictment charged.[10] The state's evidence established that Pulis had burgled an "inhabitable structure," rendering it unnecessary for the court to decide whether the location

---

3 *Id.* at 2248-49.

4 *See id.* at 2250-51.

5 *See id.*

6 *See Sykes,* 2016 WL 7383744 at *2. The Eighth Circuit offers no authority for its conclusion other than the language of the statute itself. *See id.*

7 *See* Appellant's Supplemental Brief at 9-11.

8 "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. Rev. Stat. § 569.170 (emphasis added).

9 822 S.W.2d 541 (Mo. Ct. App. 1992)

10 Records available to the public from Pulis's case establish that he was **not c**harged in the alternative. The amended information in Pulis's case explicitly charges him with burglarizing "a building." Furthermore, the trial court explicitly instructed the jury that that it had to find that Pulis burglarized a building.

burgled was a "building."[11] If "building" and "inhabitable structure" were separate and distinct elements, the state's failure to prove Pulis burgled a "building" would have required the court to vacate his conviction, a result it avoided by holding that proof that he burgled an "inhabitable structure" sufficed to establish his guilt.[12] In *State v. Washington,*[13] the Missouri Court of Appeals agreed with Washington that the state failed to prove that he burgled an "inhabitable structure" as his indictment charged.[14] Again, however, this absence of proof failed to result in an acquittal because the court of appeals held that the state's evidence established that Washington burgled a "building."[15] Although neither *Pulis* nor *Washington* use the term "means" in the sense that *Mathis* uses that term,[16] both courts focused on the elements of Missouri's burglary statue, specifically its locational element. It is impossible to read either decision and conclude that "building" and "inhabitable structure" are distinct and separate elements such that there are two Missouri burglary statues, one that prohibits burglaries of buildings and a second that prohibits burglaries of "inhabitable structures."

Agreeing with this understanding of both *Pulis* and *Washington,* the district court in *United States v. Bess*[17] held that the phrase "building or inhabitable structure" states a single, indivisible element.[18] Charged on remand with resolving the question whether burglary of a building under Missouri's second-degree burglary statute qualifies as a "violent felony" for

---

11 *See Pulis,* 822 S.W.2d at 544.
12 *See id.*
13 92 S.W.3d 205 (Mo. Ct. App. 2002).
14 *See id.* at 210.
15 *See id.*
16 *See* 136 S. Ct. at 2249.
17 2016 WL 6476539 (E.D. Mo. Nov. 2, 2016)
18 *See id.* at *4.

ACCA purposes,[19] the court held that *Pulis* "is persuasive authority 'inhabitable structure' in Missouri is an alternative means of committing burglary"[20] and that *Pulis* and *Washington* together demonstrate that "entering an inhabitable structure or entering a building are alternative means of committing a burglary, not separate elements of the crime of burglary."[21] Accordingly, the district court held that Bess's prior burglary convictions failed to qualify as violent felonies because the phrase "building or inhabitable structure" is a single, indivisible element.[22]

Both *Pulis* and *Washington* are models of clarity compared to *State v. Duncan,*[23] the Iowa case that *Mathis* describes as definitively answering the question whether the Iowa statute's locational element "occupied structure" comprised "means" or "elements."[24] The *Duncan* court never uses the term "means"[25] and it analyzes the Iowa burglary statute to resolve a complex unit-of-prosecution question: "If on a single occasion a person burglarizes a marina and a boat in the marina, may the county attorney prosecute the incident as one overall burglary, or must he consider the entries into the marina and the boat as two burglaries?"[26] Thus, the absence of any explicit discussion of "means" and "elements" fails to distinguish Missouri law from the Iowa law the *Mathis* Court relied on.

---

19 *See id.* at *1. The court of appeals held that burglary of an "inhabitable structure" could not qualify as a "violent felony" for ACCA purposes: "Missouri law defines 'inhabitable structure' to include 'a ship, trailer, sleeping car, airplane, or other vehicle or structure.' Mo. Rev. Stat. § 569.010(2). The statute thus covers a broader range of conduct than generic burglary and therefore does not qualify categorically as a violent felony." *Id.*

20 *Id.* at *4.

21 *Id.*

22 *See id.* at *4-*5.

23 312 N.W.2d 519 (Iowa 1981).

24 *Mathis*, 136 S. Ct. at 2256.

25 *See Duncan,* 312 N.W.2d at 520-24.

26 *Id.* at 520.

**B. Missouri pattern jury instructions treat the terms "building" or "inhabitable structure" as means of committing a burglary rather than as separate and distinct elements.**

In *Small v. United States,*[27] the court examined the Missouri pattern instructions for burglary and concluded that they treat the locations comprised within "building or inhabitable structure" as means rather than elements:

> The Missouri Approved Charge for second-degree burglary directs the charging officer to choose either "building" or "inhabitable structure" and "briefly describe the location" of the building or inhabitable structure. . . . Similarly, the Missouri Approved Instruction for second-degree burglary requires the submission of either 'building' or 'inhabitable structure' in the verdict director. . . . The "Notes on Use" following this jury instruction states that terms, including inhabitable structure, may be defined by the Court on its own motion or if requested by a party.[28]

In fact, the "How to Use This Book" section of the Missouri Approved Instructions—Criminal states: "In the instructions, parentheses enclose words or phrases that will be either omitted or included, depending upon the *facts of the case* being submitted."[29] Elements, of course, cannot depend on the "facts of the case." The facts of the case determine the "means" of committing the offense.[30]

**C. The Eighth Circuit Court ignored *Mathis's* suggestion to examine a statute pragmatically to determine whether its alternatives state "means" or "elements."**

*Mathis* suggested a pragmatic examination of a state's statute to determine whether its alternatives constituted "means" or "elements." "If statutory alternatives carry different

---

[27] 2016 WL 4582068 (W.D. Mo. Sept. 2, 2016).

[28] *Id.* at *3.

[29] Missouri Approved Instructions—Criminal (3rd ed.) (How to Use This Book, Format of Instructions and Verdict Forms).

[30] *See Mathis,* 136 S. Ct. at 2249.

punishments, then . . . they must be elements."[31] Burglaries of buildings and inhabitable structures carry the same penalty under Missouri law.[32]

*Mathis* also suggested considering whether the statute under examination contains a list of illustrative examples, which would indicate that the list contains alternative means rather than elements.[33] It is perhaps easier to analyze whether statutory alternatives are illustrative examples if, as one court did, the question is framed in double jeopardy terms.[34] Under the Missouri statute, if the phrase "building or inhabitable structure" states separate and distinct elements, then a prosecutor could charge multiple counts of burglary for a single act of breaking into a building that also qualifies as an "inhabitable structure." Thus, for example, a building that qualified as an "inhabitable structure" because it was a place "[w]here people assemble for purposes of business, government, education, religion, entertainment, or public transportation"[35] would automatically permit multiple burglary charges based on a single unlawful entry. The prosecutor could divide this single unlawful entry into (1) burglary of the building and (2) burglary of an "inhabitable structure;" that is, a place where people assemble for a specific, statutorily described purpose. Each charge would contain an element the other does not and would, therefore, survive the *Blockburger* test for determining when two offenses are the same.[36] This dubious possibility

---

31 *Id.* at 2256.

32 *See* Mo. Rev. Stat. § 569.070.1.

33 *Mathis* at 2256.

34 *See United States v. Edwards,* 836 F.3d 831, 836-37 (7th Cir. 2016) (considering the Wisconsin burglary statute's alternatives).

35 Mo. Rev. Stat. § 569.010(2)(b).

36 "The Double Jeopardy Clause permits successive punishment or prosecution of multiple offenses arising out of the same conduct only if each offense contains a unique element. *See United States v. Dixon,* 509 U.S. 688, 696, 703–04 . . . (1993) (citing *Blockburger v. United States,* 284 U.S. 299, 304 . . . (1932)); *accord United States v. Larsen*, 615 F.3d 780, 788 (7th Cir. 2010) ("In multiplicity challenges the

strongly suggests that the alternatives in the Missouri statute are best understood as what *Mathis* termed "illustrative examples"[37] rather than separate offenses.[38]

## II. CONCLUSION

In light of the inconsistency with this Court's approach compared to other Circuit's around the United States, Petitioner's Petition for Certiorari should be granted to secure and maintain uniformity. Further, Certiorari should be granted to correct the inconsistencies of the Eight Circuit Court's Judgment compared with the Supreme Court's analysis and decision in *Mathis.*

Dated

Respectfully submitted,

1221 Locust, Suite 301
St. Louis, Missouri 63103
314 231 3168
levelllittleton@cs.com

Attorney for Defendant-Appellant Sykes

---

elements of each offense—not the specific offense conduct—determine whether two offenses are the same for purposes of double jeopardy."). **After *Mathis* the divisibility of a statute rests on the same distinction between elements and means.** 136 S. Ct. at 2254–55." *United States v. Edwards,* 836 F.3d at 836 (emphasis added).

[37] *Mathis*, 136 S. Ct. at 2256.

[38] *See United States v. Edwards,* 836 F.3d at 837.

# APPENDIX A

## Decision of United States Court of Appeals for the Eighth Circuit

# APPENDIX B

## Decision of United States District Court EDMO

# APPENDIX C

## Decision of United States Court of Appeals Denying Rehearing and Rehearing Enbanc